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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1949

No. 230

SWIFT & COMPANY PACKERS, ET AL.,
PETITIONERS,

vs.

COMPANIA COLOMBIANA DEL CARIBE, SA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 3, 1949.

CERTIORARI GRANTED OCTOBER 10, 1949.

SUPREME COURT OF THE UNITED STATES

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[fol. 3]

IN THE DISTRICT COURT OF THE UNITED STATES, IN AND FOR THE DISTRICT OF THE CANAL ZONE, BALBOA DIVISION

LIBEL—Filed March 7, 1948

Admiralty No. 2798

SWIFT & COMPANY PACKERS, et al.,

vs.

COMPANIA TRANSMARITIMA COLUMBIANA, S. A.

To the Honorable, Bunk Gardner, the Judge of the District Court of the United States in and for the District of the Canal Zone, Balboa Division:

The libel and complaint of Swift & Company, Packers, v. Mercade y Cia, S en C, Cia Industrial y Comercial Casal, Alonso Martinez e Hijo, Sobrinos Abaseal S. L., E. Labrador y Cia, S en C, A. Diez y cia, J. Noto y Cia, Arias S. A., Garcia Barquin y Cia, V. Martinez y Cia, Cacicedo y Cia, Fernando Campa, Jose Gomez Martinez and Luis A. Noboa N., against Compania Transmaritima Columbiana, S. A., in a cause of cargo shortage and/or damage, civil and maritime, alleges upon information and belief:

I

Libelant, Swift & Company, Packers, is a corporation duly organized and existing under and by virtue of the laws of the State of Nevada, U. S. A.

[fol. 4] Arias S. A., is a corporation duly organized and existing under and by virtue of the laws of the Republic of Cuba.

Cia Industrial y Comercial Casal, Alonso Martinez e Hijo, Sobrinos Abascal, S. L., A. Diez y Cia, Noto y Cia, Garcia Barquin y Cia, V. Martinez & Cia and Cacicedo y Cia, are limited companies organized and existing under and by virtue of the laws of the Republic of Cuba.

V. Mercade y Cia, S en C., and E. Labrador y Cia, S en C are partnerships organized and existing under and by virtue of the laws of the Republic of Cuba.

Fernando Compa and Jose Gomez Martinez are individuals, citizens and residents of the Republic of Cuba.

Louis A. Noboa N. is an individual, citizen and resident of the Republic of Colombia.

II

Respondent, Compañia Transmaritima Columbiana, S. A., is a corporation organized and existing under and by virtue of the laws of the Republic of Columbia and is engaged in the business of carrying cargo for hire, as a common carrier on the high seas, in which business it owned and operated the M/V Cali which vessel, at all the times hereinafter mentioned was a general ship engaged in the common carriage of merchandise for hire between, amongst others, the ports of Guayaquil, Ecuador and Cienfuegos and Santiago de Cuba, Cuba.

[fol. 5] As to Libelant—Swift & Company, Packers

III

On or about January 7, 1948, Luis A. Noboa N. delivered to respondent and the M/V Cali at the port of Guayaquil, Ecuador, 7500 bags of rice, in good order and condition, to be carried from said port of Guayaquil, Ecuador, to the port of Cienfuegos, Cuba, there to be delivered in like good order and condition as when shipped, to the order of the shipper, in consideration of an agreed freight, and in accordance with the valid terms of a certain bill of lading, No. 1, then and there signed, and delivered to the shipper, by the duly authorized agent and representative of respondent and of the M/V Cali.

On or about January 7, 1948, Luis A. Noboa N. delivered to respondent and the M/V Cali at the port of Guayaquil, Ecuador, 7500 bags of rice, in good order and condition, to be carried from said port of Guayaquil, Ecuador, to the port of Santiago de Cuba, there to be delivered in like good order and condition as when shipped to the order of the shipper, in consideration of an agreed freight, and in accordance with the valid terms of a certain bill of lading, No. 2, then and there signed and delivered to the shipper

by the duly authorized agent and representative of respondent and of the M/V Cali.

IV

Thereafter the respondent loaded the merchandise described in Article III hereof on board the M/V Cali and the said vessel, having on board the said merchandise [fol. 6] sailed from the said port of Guayaquil, Ecuador, but never arrived at either the port of Cienfuegos or the port of Santiago de Cuba. The said M/V Cali and those in charge of her, and respondent, discharged a certain portion of said shipments on the Island of Grand Cayman in a seriously damaged condition, wetted by sea water and fuel oil and/or other substances to your libelant unknown. As to said portion of said shipment so discharged, it was not placed in a proper warehouse or warehouses and consequently became further damaged and certain portions of same were pilfered by persons unknown to your libelant, said pilferage being caused by the failure of the respondent and/or respondent's representatives and/or agents to provide adequate watchman service. The remainder of the said shipments remained in the hull of the M/V Cali, which is ashore off the Island of Grand Cayman in a sunken or partially sunken condition, and said remainder of said shipments has become and is a total loss. No part of either of said shipments has ever been delivered to libelant at either the port of Cienfuegos or the port of Santiago de Cuba, and respondent has failed and refused to make delivery thereof.

V

Prior to the arrival of the M/V Cali at Grand Cayman and the loss and damage complained of herein, and prior to the commencement of this action, libelant, Swift & Company, Packers, became the owner of all the merchandise referred to in Article III hereof and by reason of the matters alleged has sustained damage in the sum of $190,000.00, no part of which has been paid.

[fol. 7] As to Libelants—V. Mercade y Cia, S en C, Cia Industrial y Comercial Casal, Alonso Martinez e Hijo, Sobrinos Abascal S. L., E. Labrador y Cia, S en C, A. Diez y Cia, J. Noto y Cia, Arias, S. A., Garcia Barquin y Cia, V. Martinez y Cia, Cacicedo y Cia, Fernando Campa, Jose Gomez Martinez and Luis A. Noboa N.

VI

During December, 1947, and the early part of January, 1948, Luis A. Noboa N. delivered or caused to be delivered to respondent and the M/V Cali at the port of Guayaquil, Ecuador, 5,000 bags of rice, in good order and condition to be carried to the port of Cienfuegos, Cuba, there to be delivered in like good order and condition as when shipped, to the order of shipper, in consideration of an agreed freight and in accordance with the valid terms of four certain bills of lading then and there signed, and delivered to the shipper, by the duly authorized agent and representative of respondent and of the M/V Cali.

During December, 1947, and the early part of January, 1948, Luis A. Noboa N. delivered or caused to be delivered to respondent and the M/V Cali at the port of Guayaquil, Ecuador, 10,000 bags of rice, in good order and condition to be carried to the port of Santiago de Cuba, there to be delivered in like good order and condition as when shipped, to the order of shipper, in consideration of an agreed freight and in accordance with the valid terms of ten certain bills of lading then and there signed, and delivered to the shipper, by the duly authorized agent and representative of respondent and of the M/V Cali.

[fol. 8]

VII

Thereafter the respondent loaded the merchandise described in Article VI hereof on board the M/V Cali and the said vessel, having on board the said merchandise sailed from the said port of Guayaquil, Ecuador, but never arrived at either the port of Cienfuegos or the port of Santiago de Cuba. The said M/V Cali and those in charge of her, and respondent, discharged a certain portion of said shipments on the Island of Grand Cayman in a seriously injured and damaged condition, wetted by sea water and fuel oil and/or other substances to your libelants unknown. As to said portion of said shipment so discharged, it was not placed in a proper warehouse or warehouses and consequently became further damaged and certain portions of same were pilfered by persons unknown to your libelants, said pilferage being caused by the failure of the respondent and/or respondent's representatives and/or agents to provide adequate watchman service.

The remainder of the said shipments remained in the hull of the M/V Cali, which is ashore off the Island of Grand Cayman in a sunken or partially sunken condition, and said remainder of said shipments has become and is a total loss. No part of any of said shipments has been delivered to any of libelants either at the port of Cienfuegos or the port of Santiago de Cuba, and respondent has failed and refused to make delivery thereof.

VIII

Prior to the arrival of the M/V Cali at Grand Cayman and the loss and damage complained of herein, and prior [fol. 9] to the commencement of this action, libelant V. Martinez y Cia became the owner of 1,000 bags of said rice destined for Cienfuegos and by reason of the matters herein alleged, sustained damage in the sum of $12,666.00, no part of which has been paid;

Prior to the arrival of the M/V Cali at Grand Cayman and the loss and damage complained of herein, and prior to the commencement of this action, libelant Fernando Campa became the owner of 1,000 bags of the rice destined for Cienfuegos and by reason of the matters herein alleged, sustained damage in the sum of $12,666.00, no part of which has been paid;

Prior to the arrival of the M/V Cali at Grand Cayman and the loss and damage complained of herein, and prior to the commencement of this action, libelant Jose Gomez Martinez became the owner of 1,000 bags of the rice destined for Cienfuegos and by reason of the matters herein alleged, sustained damage in the sum of $12,666.00, no part of which has been paid;

Prior to the arrival of the M/V Cali at Grand Cayman and the loss and damage complained of herein, and prior to the commencement of this action, libelant Cacicedo y Cia became the owner of 2,000 bags of the rice destined for Cienfuegos and by reason of the matters herein alleged, sustained damage in the sum of $25,332.00, no part of which has been paid;

Prior to the arrival of the M/V Cali at Grand Cayman and the loss and damage complained of herein, and prior [fol. 10] to the commencement of this action, libelant V. Mercade y Cia, S en C., became the owner of 1500 bags of the rice destined for Santiago de Cuba, and by reason of the

matters herein alleged, sustained damage in the sum of $18,995.00, no part of which has been paid.

Prior to the arrival of the M/V Cali at Grand Cayman and the loss and damage complained of herein, and prior to the commencement of this action, libelant Cia Industrial y Comercial Casal, became the owner of 1,000 bags of the rice destined for Santiago de Cuba, and by reason of the matters herein alleged, sustained damage in the sum of $12,666.00, no part of which has been paid.

Prior to the arrival of the M/V Cali at Grand Cayman and the loss and damage complained of herein, and prior to the commencement of this action, libelant Alonso Martinez e Hijo became the owner of 1,000 bags of the rice destined for Santiago de Cuba, and by reason of the matters herein alleged, sustained damage in the sum of $12,666.00, no part of which has been paid.

Prior to the arrival of the M/V Cali at Grand Cayman and the loss and damage complained of herein, and prior to the commencement of this action, libelant Sobrinos Abascal, S. L., became the owner of 1,000 bags of the rice destined for Santiago de Cuba, and by reason of the matters herein alleged, sustained damage in the sum of $12,666.00, no part of which has been paid.

Prior to the arrival of the M/V Cali at Grand Cayman and the loss and damage complained of herein, and prior [fol. 11] to the commencement of this action, libelant E. Labrador y Cia, S en C., became the owner of 1,000 bags of the rice destined for Santiago de Cuba, and by reason of the matters herein alleged, sustained damage in the sum of $12,666.00, no part of which has been paid.

Prior to the arrival of the M/V Cali at Grand Cayman and the loss and damage complained of herein, and prior to the commencement of this action, libelant, A. Diez y Cia, became the owner of 1,000 bags of the rice destined for Santiago de Cuba, and by reason of the matters herein alleged, sustained damage in the sum of $12,666.00, no part of which has been paid.

Prior to the arrival of the M/V Cali at Grand Cayman and the loss and damage complained of herein, and prior to the commencement of this action, libelant J. Noto y Cia, became the owner of 1,000 bags of the rice destined for Santiago de Cuba, and by reason of the matters herein

alleged, sustained damage in the sum of $12,666.00, no part of which has been paid.

Prior to the arrival of the M/V Cali at Grand Cayman and the loss and damage complained of herein, and prior to the commencement of this action, libelant Arias, S. A., became the owner of 1,000 bags of the rice destined for Santiago de Cuba, and by reason of the matters herein alleged sustained damage in the sum of $12,666.00, no part of which has been paid.

Prior to the arrival of the M/V Cali at Grand Cayman and the loss and damage complained of herein, and prior [fol. 12] to the commencement of this action, libelant, Garcia Barquin y Cia, became the owner of 500 bags of the rice destined for Santiago de Cuba, and by reason of the matters herein alleged, sustained damage in the sum of $6,333.00, no part of which has been paid.

At all material times, libelant, Luis A. Naboa N, was the owner of 1,000 bags of the rice destined for Santiago de Cuba, and by reason of the matters herein alleged, sustained damage in the sum of $12,666.00, no part of which has been paid.

IX

As to All Libelants

All and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

Wherefore, libelants pray that:

(1) Process in due form of law according to the rules and practice of this Honorable Court, in causes of admiralty and maritime jurisdiction, may issue against said respondent, Compania Transmaritima Columbiana, S. A., citing it to appear and answer, on oath all and singular the matters aforesaid;

(2) In case said respondent cannot be found within this District, then all goods and chattels belonging to it within this District, and in particular a certain vessel known as the Alacran or the Caribe, now lying in, tran- [fol. 13] sitting or presently to arrive at or in the Panama Canal, within this District, its engines, boilers, tackle and gear of whatever nature or character, may be attached

by process of foreign attachment in the amount of $380,000.00, the sum sued for in this libel, with interest and costs and disbursements of your libelant;

(3) That the said vessel, her engines, boilers, tackle and gear may be sold under the direction of this Court, and the proceeds of said sale be brought into this Court;

(4) After due proceedings had the Court will order, adjudge and decree that the said respondent pay to each of your libelants the respective damages suffered by them as aforesaid, together with interest on said amounts and their costs and disbursements;

(5) Your libelants have such other and further relief in the premises as equity, law and the nature of the case may require.

(Sgd.) McGrath, Sheridan & Thomas, Deutsch, Kerrigan & Stiles, Proctors for Libelants.

(Signed) W. J. Sheridan, Jr., Advocate.

UNITED STATES OF AMERICA,
Canal Zone, ss:

Personally came and appeared before me, the undersigned authority, who being by me first duly sworn on his oath, deposes and says:

That he is a member of the firm of McGrath, Sheridan & Thomas, proctors for libelant; that he has read the fore- [fol. 14] going libel and knows the contents thereof, and that the same are true and correct to the best of his knowledge, information and belief;

That the sources of deponent's knowledge and the grounds of his belief are communications received from libelants and their agents and from documents and papers in his possession as proctor for the libelants;

That he makes this verification as a proctor for libelants for the reason that libelants are foreign corporations, limited companies and partnerships, none of whose officers or partners is within this jurisdiction, and individuals none of whom are in this jurisdiction.

(Sgd.) W. J. Sheridan, Jr., (W. J. Sheridan, Jr.).

Sworn to and subscribed before me this seventh day of March, 1948. (Sgd.) C. T. McCormick, Jr., Clerk. (Seal.)

(Filed March 7, 1948)

[Title omitted]

Know All Men By These Presents: That we, Swift & Company, Packers, V. Mercade y Cia, S. en C., Cia Industrial y Comercial Casal, Alonso Martinez e Hijo, Sobrinos Abascal S. L., E. Labrador y Cia, S. en C., A. Diez y Cia, J. Noto y Cia, Arias S. A., Garcia Barquin y Cia, V. [fol. 15] Martinez y Cia, Cacicedo y Cia, Ferrando Campa, Jose Gomez Martinez, and Luis A. Noboa N, as principals, and U. S. Fidelity & Guaranty Co., as surety, are held and firmly bound to Compania Transmaritima Columbiana, S. A., in the sum of two hundred and fifty and no 100 ($250.00) dollars, to be paid to the Compania Transmaritima Columbiana, S. A., to the payment whereof, we bind ourselves, our successors or assigns, jointly, severally and firmly by these presents.

Dated on this 7th day of March, 1948.

Whereas, Swift & Company, Packers, V. Mercade y Cia, S. en C., Cia Industrial y Comercial Casal, Alonso Martinez e Hijo, Sobrinos Abascal S. L., E. Labrador y Cia, S. en C., A. Diez y Cia, J. Noto y Cia, Arias S. A., Garcia Barquin y Cia, V. Martinez y Cia, Cacicedo y Cia, Fernando Campa, Jose Gomez Martinez and Luis A. Noboa N., are about to file their libel against Compania Transmaritima Columbiana, S. A., praying for a writ of foreign attachment of the goods and chattels of respondent, and particularly the Steamship Alacran, or the Caribe, in the District Court of the United States in and for the District of the Canal Zone, in a cause of cargo damage, civil and maritime;

Now, Therefore, the condition of this obligation is such that if the said Swift & Company, Packers, V. Mercade y Cia, S. en C., Cia Industrial y Comercial Casal, Alonso Martinez e Hijo, Sobrinos Abascal S. L., E. Labrador y Cia, S. en C., A. Diez y Cia, J. Noto y Cia, Arias, S. A., Garcia Barquin y Cia, V. Martinez y Cia, Cacicedo y Cia, [fol. 16] Fernando Campa, Jose Gomez Martinez and Luis A. Noboa N, shall prosecute as aforesaid and abide all orders, interlocutory and final of the aforesaid Court, and pay all costs and expenses if such shall be awarded against

it by the final decree of the aforesaid Court, or any appellate Court, then this obligation shall be void, otherwise it shall remain in full force and virtue.

Swift & Company, Packers, et al., (Sgd.) McGrath, Sheridan & Thomas, By: Deutsch, Kerrigan & Stiles, Their Proctors. By W. J. Sheridan, Jr. United States Fidelity and Guaranty Company, (Sgd.) B. Luthy, Attorney-in-Fact. (Seal.)

PROCESS IN PERSONAM WITH CLAUSE OF FOREIGN ATTACHMENT

[Title omitted]

The President of the United States of America, to the Marshal of the District of the Canal Zone, Greeting:

Whereas, a Libel has been filed in the United States District Court for the District of the Canal Zone, on the [fol. 17] 7th day of March, 1948, by Swift & Company Packers, Et Als, Libelants, against Compania Transmaritima Columbiana, S. A., respondent, in a certain action civil and maritime for cargo shortage and damage therein alleged to be due to the said Libelants, amounting to $380,000.00 and praying that a Citation may issue against the said respondent with clause of Foreign Attachment, pursuant to the Rules and Practice of this Court:

Now, Therefore, we do hereby Command You, the said Marshal of the District of the Canal Zone to Cite And Admonish the said Respondent if it shall be found in your District, to appear before the said District Court at the United States Court Room in the United States Court House at Ancon, Canal Zone, Fifteen (15) Days after the service hereof at nine (9) o'clock in the forenoon, then and there to answer the said libel, and to make its allegations in that behalf; and if the said respondent cannot be found that you attach its goods and chattels and in particular the steamship Alacran, or the Caribe its engines, boilers and tackle, to the amount sued for; and have you then and there this writ with your return thereon.

Witness, the Honorable Bunk Gardner, Judge of Said Court, this 7th day of March, in the year of our Lord one thousand nine hundred and forty-eight.

(Signed) C. T. McCormick, Jr., Clerk of Court.
(Seal.)

Issued March 7, 1948.

[fol. 18] MARSHAL'S RETURN ON PROCESS IN PERSONAM WITH CLAUSE OF FOREIGN ATTACHMENT

(Filed March 24, 1948)

The within Libel, in Admiralty, Process in Personam, with Clause of Foreign Attachment, Verification and Stipulation for Costs, came into my hands for service on the 7th day of March, 1948, and in obedience to the command contained therein, I served the same by going on board the S. S. Caribe while she was under way in the Gatun Locks, but waited until she was tied up to the dock wall before making service, in The Panama Canal, within the Canal Zone, by displaying the original to the Master of the S. S. Caribe, Captain John Bowie, and by delivering to and leaving with him copies of all the above named documents, by appointing Captain John Bowie as Caretaker, (a signed copy of his appointment is hereby attached and made a part of this return), and by thereafter serving an Order of Arrest on the Captain of the Port, Balboa, Canal Zone, and by posting copies of the Citation in three public places, to wit, the Post Offices at Balboa, Canal Zone, and Ancon, Canal Zone, and the District Court bulletin board at the Court House in Ancon, Canal Zone, and by publishing the Citation in The Nation, an English language newspaper of general circulation in the Canal Zone, (the a-fidavit of publication is hereby attached and made a part of this return), and by taking into my official custody the S. S. Caribe, her engines, boilers, ta-kle, apparel and furniture, and also some gear, hoists, winches, etc., from the M. V. Cali, part of the goods and chattels of the respondents.

[fol. 19] Marshal's Fees

Service on Captain, S. S. Caribe	$6.00
Mileage on service	4.10
Mileage, Posting Citations	.30
Service on Port Captain	2.00
Mileage on serving Port Captain	.10
	12.50

(Signed) John E. Hushing, Marshal of the United States in and for the District of the Canal Zone.

Form No. 39.

Public Notice of Attachment

Office of the Marshal of the United States, District of the Canal Zone

March 8, 1948.

This S. S. Caribe, her boilers, engines, etc., having been attached by me and now being in my possession by virtue of a Libel in Admiralty, Process in Personam, With Clause of Foreign Attachment issued out of the District Court of the United States for the District of The Canal Zone Notice Is Hereby Given that any person removing or attempting to remove said S. S. Caribe, her engines, boilers, [fol. 20] etc., without my written permission, or in any way interfering with said S. S. Caribe, her engines, boilers, tackle, etc. or my duly authorized Deputy or Keeper in charge thereof, Will Be Prosecuted To The Extent Of The Law.

(Signed) John E. Hushing, U. S. Marshal, In and for the District of the Canal Zone.

Receipt acknowledged:

(Signed) E. S. Hutchinson, Captain of the Port, Balboa, Canal Zone.

APPOINTMENT OF CUSTODIAN

United States Marshal's Office, District of the Canal Zone

March 8, 1948.

By virtue of a Libel in Admiralty, Process in Personam With Clause of Foreign Attachment, issued out of the United States District Court for said District, in the matter of Swift & Company Packers, et al and against Compania Transmaritima Columbiana, S. A., and Compania Colombia del Caribea, S. A. I have levied upon S. S. Caribe, formerly the S. S. Alacran; her engines, boilers and tackle and furniture and apparel, and now have the same in my possession. And I herewith appoint John Bowie as Custodian of the same to safely keep, and to allow no one to remove, molest [fol. 21] or in any manner interfere with the same, save upon the order of the United States Marshal of said District.

(Signed) John E. Hushing, United States Marshal.

I hereby accept the appointment:

(Signed) John Bowie.

LEGAL NOTICE

[Title omitted]

THE UNITED STATES OF AMERICA

THE UNITED STATES DISTRICT COURT, FOR THE DISTRICT OF THE CANAL ZONE, BALBOA DIVISION.

Libel—No. 2798

In Admiralty, Process In Personam, With Clause of Foreign Attachment

SWIFT & COMPANY, PACKERS, et al.,

vs.

COMPANIA TRANSMARITIMA COLOMBIANA, S. A.

Whereas, on the 7th day of March, 1948, Swift & Company, Packers, et al, filed a Libel in the District Court of the United States for the District of the Canal Zone against [fol. 22] the *the* S. S. Caribe, her boats, tackle, apparel and

furniture, in a cause of Libel, in Admiralty, Process in Personam with Clause of Foreign Attachment, Civil and Maritime. And Whereas, by virtue of process in due form of law, to me directed, returnable on the 24th day of March, 1948, I have seized and taken the S. S. Caribe, her engines, boilers, etc., and have her in my custody. Notice Is Hereby Given, that a District Court will be held in the United States Court Room, in the City of Ancon, Canal Zone, on the 24th day of March, 1948, for the trial of said premises, and the owner or owners, and all persons who may have or claim any interest, are hereby cited to be *an* appear at the time and place aforesaid, to show cause, if any they have, why a final decree should not pass as prayed.

McGrath, Sheridan and Thomas, Deutsch, Kerrigan and Stiles, Proctors for Libelants.

John E. Hushing, United States Marshal in and for the District of the Canal Zone.

William H. Forbis, after first being duly sworn, on oath say:

That he is the Classified Advertising Manager of The Nation, and English-language newspaper published in the City of Panama, Republic of Panama, and of general circulation in the Canal Zone; that he knows of his own knowl- [fol. 23] edge that the attached citation was published in the said newspaper on March 10, 11, and 12, 1948.

(Signed) William H. Forbis.

District of the Canal Zone,
Ancon, Canal Zone, ss:

Subscribed and sworn to before me this 22d day of March, 1948.

(Signed) Dorothy Sellars, Deputy Clerk of Court.
(Seal)

Supplemental and Amended Libel

[Title omitted]

To The Honorable Bunk Gardner, the Judge of the District Court of the United States in and for the District of the Canal Zone, Balboa Division:

The supplemental and amended libel and complaint of Swift & Company, Packers, V. Mercade y Cia, S. en C, Cia Industrial y Comercial Casal, Alonso Martinez e Hijo, Sobrinos Abascal S. L., E. Labrador y Cia, S en C, A. Diez y Cia, J. Noto y Cia, Arias S. A., Garcia Barquin y Cia, V. Martinez y Cia, Cacicedo y Cia, Fernando Campa, Jose Gomez Martinez and Luis A. Noboa N., against Compania Transmaritima Columbiana; S. A., and Compania Colombiana Del Caribe, S. A., in a cause of cargo shortage [fol. 24] and/or damage, civil and maritime, alleges upon information and belief:

I

Libelants reiterate and reallege all of the allegations contained in Articles I through VIII, inclusive, of the original libel; wherever reference is made to "respondent" in the allegations contained in said articles, said reference is to respondent Compania Transmaritima Columbiana, S. A.

II

Since the filing of the original libel herein on March 7, 1948, libelant has learned that respondent Compania Transmaritima Columbiana, S. A., has attempted, on or about March 4, 1948, to divert itself of its property and assets and particularly the Steamship Alacran in fraud of libelants' rights.

Libelant is informed and believes and, therefore, alleges that on March 4, 1948, or shortly prior thereto there was organized, under the laws of the Republic of Colombia, a corporation known as Compania Colombiana Del Caribe, S. A., now, by this supplemental and amended libel made a party respondent hereto.

Said Compania Colombiana Del Caribe, S. A. was organized by the directors, officers and stockholders of respondent Compania Transmaritima Columbiana, S. A., and no substantial monies were paid into its treasury for the issuance of the stock thereof, if any such stock were actually

issued. Compania Colombiana Del Caribe, S. A., is merely [fol. 25] the creature or alter ego of Compania Transmaritima Columbiana, S. A., and of its directors, officers and stockholders. The attempted transfer of the Steamship Alacran from Compania Transmaritima Columbiana, S. A., to Compania Colombiana Del Caribe, S. A., was not for a real or valid consideration and no real equitable price was paid therefor but, as before alleged, said attempted transfer was wholly fictitious and in an attempt to defraud your libelants of their rights.

In the furtherance of said fraudulent and nefarious scheme, Compania Colombiana Del Caribe, S. A., through its purported agents and representatives appeared before the Customs and Port Officials of Baranquilla, Colombia, on or about March 4, 1948, and petitioned to have the name of the said Steamship Alacran changed to Caribe and further petitioned to have the Alacran's register changed accordingly, and a new register was issued for said Steamship Alacran by said Colombian official or officials in which said vessel was designated the Steamship Caribe.

III

There is no real or actual difference between respondents Compania Transmaritima Columbiana, S. A., and Compania Colombiana Del Caribe, S. A., and before this Court of admiralty of the United States, they should be held to be, as they are, one and the same.

IV

Alternatively, on information and belief, your libelants allege that respondent Compania Colombiana Del Caribe, [fol. 26] S. A., is indebted unto Compania Transmaritima Columbiana, S. A., for the full purchase price of said Steamship Alacran, now known as the Steamship Caribe, or a substantial part thereof.

V

All and singular, the premises are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

Wherefore, libelants pray that:

(1) Process in due form of law, according to the rules and practice of this Honorable Court, in causes of admi-

ralty and maritime jurisdiction, may issue against said respondents Compania Transmaritima Columbiana, S. A., and Compania Colombiana Del Caribe, S. A.; citing them to appear and answer on oath all and singular the matters aforesaid;

(2) In case said respondents can not be found within this district, then all goods and chattels belonging to them within this district and in particular a certain vessel formerly known as the Alacran, now registered under the name Caribe, now lying in the Panama Canal or within the waters constituting the Pacific entrance to said Canal, within this district, its engines, boilers, tackle and gear of whatever nature or character, may be attached by process of foreign attachment in the amount of Three Hundred Eighty Thousand ($380,000.00) Dollars, the sum sued for in this libel, with interest and costs and disbursements of your libelants.

[fol. 27] (3) That the said vessel, her engines, boilers, tackle and gear may be sold under the direction of this Court, and the proceeds of said sale be brought into this Court.

(4) Alternatively, that the Steamship Caribe, formerly the Alacran, be attached in the hands of respondent Compania Colombiana Del Caribe, S. A., as being in reality the goods and effects of respondent Compania Transmaritima Columbiana, S. A., and or as the sole security for the agreed purchase price of said vessel in said purported sale from respondent Compania Transmaritima Columbiana, S. A., to respondent Compania Colombiana Del Caribe, S. A., and that said respondent Compania Colombiana Del Caribe, S. A., be also made a garnishee in these proceedings, and that it be cited additionally as such to appear before this Court and answer on oath the attached interrogatories as to debits, credits, and effects of the respondent Compania Transmaritima Columbiana, S. A., which it has in its hands.

(5) After due proceedings had the Court will order, adjudge and decree that the said respondents pay to each of your libelants the respective damages suffered by them as aforesaid, together with interest on said amounts and their costs and disbursements.

(6) That your libelants have such other and further relief in the premises as equity, law, and the nature of the case may require.

(Sgd.) McGrath, Sheridan & Thomas, Deutsch, Kerrigan & Stiles, Proctors for Libelants.

[fol. 28] United States of America,
Canal Zone, ss:

Personally came and appeared before me the undersigned authority, Daniel E. McGrath, who, being by me first duly sworn on his oath, deposes and says:

That he is a member of the firm of McGrath, Sheridan & Thomas, proctors for libelant; that he has read the foregoing supplemental and amended libel and knows the contents thereof, and that the same are true and correct to the best of his knowledge, information and belief;

That the sources of deponent's knowledge and the grounds of his belief are communications received from libelants and their agents and from documents and papers in his possession as proctor for the libelants;

That he makes this verification as a proctor for libelants for the reason that libelants are foreign corporations, limited companies and partnerships, none of whose officers or partners is within this jurisdiction, and individuals none of whom are in this jurisdiction.

(Sgd.) Daniel E. McGrath.

Sworn to and subscribed before me this Eighth day of March, 1948. (Sgd.) C. T. McCormick, Jr., Clerk. (Seal.)

[fol. 29] Interrogatories to Be Propounded to Respondent Compania Colombiana Del Caribe, S. A., as Garnishee—Filed March 8, 1948

[Title omitted]

1. State when and where you were incorporated.

2. State how many shares of your capital stock was issued as of March 4, 1948, giving the names of the subscribers to said stock, the value per share, the amount

actually paid in cash by each subscriber, and the date of said payment.

3. Give a list of your directors and officers.

4. a. State when the first meeting of incorporators was held.

b. When the first meeting of the stockholders was held.

c. When the first meeting of directors was held.

5. When were negotiations with Compania Transmaritima Columbiana, S. A., for the purchase of the Steamship Alacran commenced, how long did they continue, and when were they consummated?

6. State in detail the real and actual terms governing the acquisition by you from Compania Transmaritima Columbiana, S. A., of the Steamship Alacran.

[fol. 30] 7. If the sale involved the payment of any cash, state the amount of same and the method by which it was paid, attaching thereto the original of the check which you issued.

8. If said sale was wholly or partly on credit, state the amount still due and owing Compania Transmaritima Columbiana, S. A., when and where the purchase price or the balance thereof it to be paid, and attach to your answers the note or notes or other evidences of indebtedness of the said purchase price.

9. State whether or not you gave a mortgage to Compania Transmaritima Columbiana, S. A., on the Steamship Alacran or Caribe and attach to your answers the original or a certified copy of said mortgage, if you reply that one was given.

10. If you answer the foregoing question in the negative, state what security you did give Compania Transmaritima Columbiana, S. A., for the unpaid purchase price or unpaid balance of the purchase price for the Steamship Alacran or Caribe.

11. State what experience or connections or relations each of your stockholders, officers, and directors had had in the steamship business.

12. State which of your stockholders, officers, and directors are in any way, either directly or indirectly connected with Compania Transmaritima Columbiana, S. A., giving fully [fol. 31] their connection and position with said company.

(Sgd.) McGrath, Sheridan & Thomas, Deutsch, Kerrigan & Stiles, Attorneys for Libelants.

PROCESS IN PERSONAM WITH CLAUSE OF FOREIGN ATTACHMENT—Issued March 8, 1948

[Title omitted]

The President of the United States of America, to the Marshal of the District of the Canal Zone, Greeting:

Whereas, a supplemental and amended libel has been filed in the United States District Court for the District of the Canal Zone, on the 8th day of March 1948, by Swift & Company Packers, Et Al., Libelants, against Compania Transmaritima Columbiana, S. A., and Compania Colombiana Del Caribe, S. A., respondents, in a certain action civil and maritime for cargo shortage and damage therein alleged to be due to the said Libelants, amounting to $380,000.00 and praying that a Citation may issue against the said respondents with clause of Foreign Attachment, pursuant to the Rules and Practice of this Court;

Now, Therefore, we do hereby Command You, the said Marshal of the District of the Canal Zone, to Cite and Admonish the said Respondents if they shall be found in [fol. 32] your District, to appear before the said District Court at the United States Court Room in the United States Court House at Ancon, Canal Zone, Fifteen (15) Days after the service hereof at nine (9) o'clock in the forenoon, then and there to answer the said libel, and to make their allegations in that behalf; and if the said respondents cannot be found, that you attach their goods and chattels and in particular the steamship Caribe, formerly the Alacran, its engines, boilers and tackle, to the amount sued for; and have you then and there this writ with your return thereon.

Witness, the Honorable Bunk Gardner, Judge of Said Court, this 8th day of March in the year of our Lord one thousand nine hundred and forty-eight.

(Sgd.) C. T. McCormick, Jr., Clerk of Court. (Seal.)

MARSHAL'S RETURN ON PROCESS IN PERSONAM WITH CLAUSE OF FOREIGN ATTACHMENT—Filed March 24, 1948

The within Supplemental and Amended Libel, in admiralty, Process in Personam, with Clause of Foreign Attachment, Interrogatories and Verification, came into my hands for service on the 8th day of March, 1948, and in obedience to the command contained therein, I served the same by going abo-rd the S. S. Caribe, berthed at Pier 18, Balboa, within the Canal Zone, and by displaying the original to the Master of the S. S. Caribe, Captain John Bowie, [fol. 33] and by delivering to and leaving with him copies of the above named documents, and by taking into my official custody the S. S. Caribe, her engines, boilers, tackle, apparel and furniture, and also some winches, hoists and other gear found on deck, goods and chattels of the Respondents, and by immediately thereafter serving a Notice of Arrest on the Captain of the Port, Balboa, Canal Zone, and by posting copies of the Citation in three public places in the Canal Zone, to-wit, the Post Offices at Ancon, Canal Zone, Balboa, Canal Zone, and the bulletin board at the United States District Court, Ancon, Canal Zone, and by appointing Captain John Bowie Custodian of the S. S. Caribe, and by publishing the Citation in The Nation, an English language newspaper of general circulation in the Canal Zone, and the Affidavit of Publication is hereby attached and made a part of this return.

(Signed) John E. Rushing, Marshal of the United States in and for the District of the Canal Zone.

Marshal's Fees

Service	$8.00
Mileage on service	.10
Service on Port Capt.	2.00
Mileage, Posting Citatns.	.30
Mileage, Serving Port C.	.10
Total	10.50

[fol. 34] AFFIDAVIT RE PUBLICATION OF CITATION FILED WITH MARSHAL'S RETURN

Legal Notice

The United States of America

THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF THE CANAL ZONE, BALBOA DIVISION

No. 2798

In Admiralty Supplemental and Amended Libel

SWIFT & COMPANY, PACKERS, et al.

vs.

CIA. TRANSMARITIMA COLOMBIANA, S. A. & COMPANIA COLOMBIANA DEL CARIBE, S. A.

Whereas, on the 8th day of March, 1948, Swift & Company, Packers, et al., filed a Supplemental and Amended Libel in the District Court of the United States for the District Court of the Canal Zone, against the S. S. Caribe, her boats tackle, apparel and furniture, in a cause of Contract, Civil and Maritime. And Whereas, by virtue of process in due form of law, to me directed, returnable on the 24th day of March, 1948, I have seized and taken the said S. S. Caribe, her boilers, engines, etc., and have her in my custody. Notice Is Hereby Given that a District Court will be held in the United States Court Room, in the City of An on, Canal Zone, on the 24th day of March, 1948, for the trial premises, and the owner or owners, and all persons who may have or claim any interest, are hereby cited to be [fol. 35] and appear at the time and place aforesaid, to show cause, if any they have, why a final decree should not pass as prayed.

McGrath, Sheridan and Thomas; Deutsch, Kerrigan and Stiles, Proctors for Libelants. John E. Hushing, United States Marshal in and for the District of the Canal Zone.

District of the Canal Zone,
Ancon, Canal Zone, ss:

William H. Forbis, after first being duly sworn, on oath says:

That he is the Classified Advertising Manager of The Nation, an English-language newspaper published in the City of Panama, Republic of Panama, and of general circulation in the Canal Zone; that he knows of his own knowledge that the attached citation was published in the said newspaper on March 10, 11, and 12, 1948.

(Signed) William H. Forbis.

Subscribed and sworn to before me this 22nd day of March, 1948. (Signed) Dorothy Sellars, Deputy Clerk of Court. (Seal.)

[fol. 36] Claim of Respondent

[Title omitted]

United States of America,
Canal Zone, ss:

To the Honorable Bunk Gardner, Judge of Said Court:

Now Comes, John Bowie, and having been duly sworn, upon his oath deposes and says that Compania Colombiana Del Caribe, S. A. is the true and bona fide owner of the S. S. Caribe, lier engines, et cetera, and that no other person is the owner thereof, and that John Bowie, affiant, is the master of such steam ship and at the time of the arrest thereof was in possession of said steam ship, her engines, et cetera, and that he is the lawful bailee thereof for the owner.

Wherefore, he prays to defend accordingly.

(Sgd.) John Bowie, Master. (S.) Charles E. Ramirez, of Van Sielen & Ramirez, Proctors for Compania Colombiana Del Caribe, S. A., Respondent. Address: Box 124, Ancon, C. Z.

[fol. 37] UNITED STATES OF AMERICA,
Canal Zone, ss:

John Bowie, being duly sworn, deposes and says that he is the claimant described in and who executed the foregoing claim; that he has read said claim and knows the contents thereof; that the same is true to his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and that as to those matters, he believes it to be true.

(S.) John Bowie.

Sworn to before me this 15th day of March, 1948.
Dorothy Sellars, Deputy Clerk of Court. (Seal.)

STIPULATION FOR COSTS

(Respondent's)

[Title omitted]

Stipulation for Costs entered into pursuant to the rules and practice of this Court.

Whereas, a libel was filed in the above Court on the 7th day of March, 1948, by Swift & Company, Packers, v. Mercade y Cia, S en C, Cia Industrial y Comercial Casal, Alonso Martinez e Hijo, Sobrinos Abascal S. L., E Labrador y Cia, S en C, A. Diez y Cia, J. Noto y Cia, Arias S. A., Garcia Barquin y Cia, V. Martinez y Cia, Cacicedo y Cia, [fol. 38] Fernando Campa, Jose Gomez Martinez and Luis A. Noboa N, against the S. S. Caribe, her engines, tackle, boilers, apparel, furniture, etc., for the reasons and causes in the said libel mentioned; and praying that process may issue against the said S. S. Caribe, her engines, tackle, boilers, apparel, furniture, etc., and the said Respondents herein hereby consenting and agreeing that in case costs are awarded against the said Respondents, the decree therefor not exceeding the sum of $250.00 may be entered against the said Respondents, and thereupon execution may issue against its chattels, goods, lands and tenements.

Now, Therefore, it is hereby stipulated and agreed for the benefit of whom it may concern that the Respondents herein are hereby bound in the sum of $250.00 cash, condi-

tioned that it shall pay all costs and expenses which shall be awarded against the said Respondents by decree of this Court, and in case of appeal by any Appellate Court, and as a guarantee therefor hereby deposits the sum of $250.00 in cash with the Clerk of this Court.

(Sgd.) Charles E. Ramirez, Of Proctors for Respondents.

Subscribed and sworn to before me this 15th day of March, 1948. (Sgd.) Dorothy Sellars, Deputy Clerk of Court. (Seal.)

[fol. 39] Filed March 15, 1948.

[Title omitted]

UNITED STATES OF AMERICA,
Canal Zone, ss:

Please take notice that the undersigned hereby moves this Court for an order dismissing the libel and the amended libel heretofore filed herein and vacating the attachment herein on the grounds and for the reasons given in the attached Notice of Motion.

Dated: March 15, 1948.

(Signed) Charles E. Ramirez, for Van Siclen & Ramirez, Proctors for Compania Colombiana Del Caribe, S. A., Address: Box 124, Ancon, C. Z.

NOTICE OF MOTION—Filed March 15, 1948

[Title omitted]

UNITED STATES OF AMERICA,
Canal Zone, ss:

Sirs:

Please take notice that upon the duly verified affidavit of Charles E. Ramirez, hereto attached, and upon the libel and amended libel heretofore filed herein and upon all of [fol. 40] the papers and proceedings heretofore herein, the

undersigned, as proctors for Compania Colombiana Del Caribe, S. A., will move this Court at a term thereof on the 22nd day of March, 1948, at nine o'clock in the forenoon of that day or as soon thereafter as counsel can be heard at the Courtroom thereof at the Ancon District Courthouse, Ancon, Canal Zone for an order of the Court declining jurisdiction herein and vacating the attachment heretofore made herein for reasons:

(a) That the suit is between foreigners.

(b) Because it appears from the face of the libel that the S. S. Caribe is in no way r-sponsible for the damage demanded in the libel.

(c) No sufficient cause has been alleged why this Court should hear this matter.

(d) Because the bond furnished with the Stipulation for Costs does not conform with the requirements of the Admiralty rules.

(e) Because the alleged fraudulent transfer is a matter to be determined and decided under the laws of the forum where such transfer was made.

And that the respondent will also ask the Court at the same time to fix the amount of the bond for the release of the vessel in a sum commensurate with the value of said [fol. 41] vessel and for such other and further relief as to the Court may seem proper in the premises.

Dated: March 15, 1948.

(Sgd.) Charles E. Ramirez, for Van Siclen & Ramirez, Proctors for Compania Colombiana Del Caribe, S. A. Address: Box 124, Ancon, C. Z.

To: Clerk of the Court, Messrs. McGrath, Sheridan & Thomas, Messrs. Deutsch, Kerrigan & Stiles, Proctors for Libelants.

Service had this 15th day of March, 1948 on the undersigned.

McGrath, Sheridan & Thomas, (Sgd.) W. J. Sheridan, Jr.

AFFADAVIT—Filed March 15, 1948

[Title omitted]

UNITED STATES OF AMERICA,
Canal Zone, ss.:

Charles E. Ramirez, being duly sworn, deposes and says that he is a member of the firm of Van Siclen & Ramirez, [fol. 42] proctors for the Compania Columbiana Del Caribe, S. A., one of the respondents herein. That this affidavit is made on behalf of said respondent and in support of an application to the Court for the relief hereinafter enumerated.

The libel is based on an alleged cause of cargo shortage and/or damage civil and maritime. Briefly, the libel alleges that various shippers whose names are set forth in the libel shipped from Guayaquil, Ecuador to various points in the Republic of Cuba on the M/V Cali, operated and owned by Respondent, Compania Transmaritima Columbiana, S. A., certain quantities of rice; that said rice was never received by the consignees; that the M/V Cali never arrived at destination; that the M/V Cali and those in charge of her discharged a certain portion of said shipments on the Island of Grand Cayman in a damaged condition; that the rice discharged at Grand Cayman was not properly warehoused, and other allegations of negligence and acts on the part of the respondents, all to the damage of the libelants in the total sum of $380,000.00.

On behalf of respondent, Compania Columbiana Del Caribe, S. A., it is contended that the Court should decline jurisdiction and vacate the attachment. The respondent, Compania Columbiana Del Caribe, S. A., seeks the relief sought in this application for the following reasons:

(a) The suit is between foreigners, as all of the libelants and respondents are persons not citizens of the United States,

[fol. 43] (b) Because it appears from the face of the libel that the S. S. Caribe is in no way responsible for the damage claimed in the libel,

(c) Because no sufficient cause has been alleged why this Court should hear this matter,

(d). Because the bond furnished with the Stipulation for Costs does not conform with the requirements of the Admiralty Rules,

(e) Because the alleged fraudulent transfer is a matter to be determined and decided under the laws of the forum where such transfer was made.

Respondent also asks that the Court fix the amount of the bond for the release of the vessel in a sum commensurate with the value of said vessel.

(a) The Court should decline jurisdiction and dismiss the libel because the suit is between foreigners, and no Federal question is involved.

(Lubicic vs. Lamport Holt Line, Ltd., 1946 A. M. C., 323).

The libelants are, as appears from the allegation of the libel all either companies or corporations, partnerships or individuals existing under and by virtue of the laws of the Republic of Cuba, or composed of citizens of the Republic of Cuba and residing therein. The only exception to this fact is the allegation that one of the libelants, Swift & Company, Packers, "is a corporation duly organized and [fol. 44] existing under and by virtue of the laws of the State of Nevada, U. S. A."

In the case of Lubicic vs. Lamport & Holt Line Ltd., et al, (supra), Judge Conger of the Southern District said in part:

"It is well established that a Federal Court has no jurisdiction of a suit between aliens where no Federal question is involved, *even though one of the parties to the suit may be a citizen.* There must be complete diversity on both sides.

See also Levering & Garriques Co. et al. vs. Marrin et al., 61 F. (2-d) 115.

The respondents, as alleged, are corporations organized and existing under and by virtue of the laws of the Republic of Columbia.

It will further be noted that as in Paragraph V of the said libel, it is alleged that "Prior to the arrival of the M V Cali at Grand Cayman and the loss and damage complained of herein, and prior to the commencement of

this action, libelant, Swift & Company, Packers, became the owner of all of the merchandise referred to in Article III hereof."

Article III alleges that one Luis A. Noboa N, who it is alleged in Paragraph I is an individual, citizen and resident of the Republic of Colombia, "delivered to respondent and the M/V Cali at the port of Guayaquil, Ecuador, 7500 bags of rice, in good order and condition, to be carried from said port of Guayaquil, Ecuador, to the port of Cienfuegos, Cuba, there to be delivered in like good order and condition as when shipped, to the order of shipper."

[fol. 45] Under Article III, it is alleged further that Luis A. Noboa N delivered to respondent, Compania Transmaritima Colombiana, 7500 bags of rice in good order and condition to be carried from said port of Guayaquil, Ecuador, to the port of Santiago de Cuba and refers to a certain Bill of Lading No. 2. It will be noted that both shipments were made to the order of shipper.

Attached hereto and made a part hereof are copies of Bills of Lading No. 1 for Cienfuegos, Cuba and No. 1 and 2 for Santiago de Cuba, and they are numbered Exhibits "A", "B", and "C", respectively. An examination of these Bills of Lading will show that Bill of Lading No. 1, Exhibit "A", shows that upon arrival of the vessel at Cienfuegos, Cuba, Swift & Company, Packers, of Havana, Cuba, were to be notified. Bills of Lading No. 1 and 2, marked herein Exhibits "B" and "C", called for the delivery of 7500 and 1000 bags of rice respectively to be shipped from Guayaquil, Ecuador to Santiago de Cuba, and Swift & Company, Packers, were to be notified regarding one of the shipments and Compania Industrial y Comercial Casal, S. A. of Santiago de Cuba were to be notified regarding the other. This clearly shows that the matter involved in this libel is wholly between foreigners and that no citizen is involved.

The allegation that Swift & Company, Packers, is a corporation duly organized and existing under and by virtue of the laws of the State of Nevada, U. S. A., while true, obviously is put in the libel to confuse the Court because as a matter of fact, as shown by the bills of lading, the Swift & Company, Packers, interested are doing business in Havana, Cuba, and there is no allegation anywhere in the libel that Swift & Company, Packers, of Havana, Cuba

[fol. 46] is a corporation incorporated under the laws of any state of the United States.

(b) The libel should be dismissed and attachment vacated because it appears from the face of the libel that the S. S. Caribe is in no way responsible for the damage claimed in the libel.

Both the libel and amended libel allege shipment on the M/V Cali, and it is alleged in the libel that the M/V Cali was the property of and was operated by the respondent, Compania Transmaritima Columbiana, S. A. The libel does not allege ownership of the S. S. Caribe, (ex-Alacran) by either of the respondents. Nevertheless, the Process in Personam directs the Marshal of the District of the Canal Zone to attach the S. S. Alacran or the S. S. Caribe. All allegations in the libel contained refer to shipment on the M/V Cali. Nowhere is it alleged that the S. S. Caribe was in any way concerned in the matter. The question of ownership will be discussed under another heading.

(c) The libel should be dismissed and attachment vacated because no sufficient cause has been alleged why this Court should hear this matter.

All of the incidents connected in any way with the subject matter of this litigation occurred in jurisdictions other than within the jurisdiction of this Court or any Court of the United States. No good reason has been shown to this Court why it should accept jurisdiction other than the fact that the S. S. Caribe is within the jurisdiction of this Court. The Court should bear in mind that in the usual course of its business, the S. S. Caribe would be in ports [fol. 47] of the Republic of Colombia and the Republic of Cuba, places where all of the libelants and respondents have places of business, as alleged in the libel.

(d) The libel should be dismissed and the attachment vacated for the reason that the bond given for costs does not conform to the requirements of the Admiralty Rules.

Examination of the bond given in this case shows that it contains no statement that the bonding company furnishing said bond is licensed to do business in the Canal Zone, nor does the bond furnished bear the verification of the Attorney-in-Fact of the said corporation, showing among other things, that the certificate to do business in the Canal Zone of the said bonding company has not been revoked.

(e) The libel should be dismissed and the attachment vacated for the reason that the fraudulent transfer alleged is a matter to be determined and decided under the laws of the forum where such transfer was made.

The amended libel alleges that the S. S. Alacran, now the S. S. Caribe, was transferred from the respondent, Compania Transmaritima Columbiana, S. A., to the respondent, Compania Colombiana Del Caribe, S. A., on March 4th, 1948, and that this was done in order to defraud libelants of their rights. However, the attention of the Court is respectfully called to the fact that there is no allegation that such alleged fraudulent transfer was contrary to the laws of the forum where the transfer was made, nor is it alleged that any of the acts committed in pursuance and furtherance of the transfer was contrary [fol. 48] to the laws of the forum where the transfer was made. Attached hereto and made a part hereof, marked Exhibit "D", is the opinion of an attorney duly licensed to practice in the Republic of Columbia, to the effect that such transaction as alleged in the libel, to-wit, transferring of the title and ownership of the vessel is not fraudulent under the laws of the Republic of Colombia, and as a matter of fact is absolutely legal.

Attached hereto and made a part hereof is a copy in Spanish and an English translation thereof, of the certificate of registration of the S. S. Caribe issued by the proper authority of the Republic of Columbia and duly authenticated by the Vice-Consul of the United States of America, at the City of Barranquilla, Colombia.

The Court should fix the amount of the bond to be given for the release of the vessel to conform with the value of the vessel and not the amount sued for.

The libelants demand a bond in the sum of $380,000.00, the amount sued for. The vessel is an old vessel, more than thirty years old, and your deponent is informed and believes, is worth only a fraction of the amount of the attachment, and it is asked of the Court that the sum required for the bond releasing the vessel be in a sum commensurate with the value of the vessel.

The Court's attention is called to the fact that in none of the pleadings, does the office address of the proctors for the libelants appear, and it is urged that this is required by the Admiralty Rules.

[fol. 49]. For all of the foregoing reasons, this deponent respectfully asks the Court that it grant the relief herein sought and that the libel be dismissed and the attachment vacated.

(Sgd.) Charles E. Ramirez, Of proctors for respondent.

Subscribed and sworn to before me this 15th day of March, 1948. (Sgd.) Dorothy Sellars, Deputy Clerk of Court. (Seal.)

3—230

[fol. 50]

"EXHIBIT A".

Mexican Ports
Ensenada
Guaymar
Yavaros
Topolobampo
Mazatlan
Manzanillo
San Jose del Cabo
Puerto Vallarta

Keene Line
111 West 7th St., Los Angeles, Calif.

Agents for
Cia. Naviera Del Pacifico, S. A.

California Ports
San Francisco
Los Angeles
Long Beach
San Diego

Shipper—Luis A. Noboa N.
Vessel—Cali
Shipped from—Guayaquil
Consigned To—Order Of Shippers

Voyage Number
Port of Discharge—Cienfuegos, Cuba
Swift & Company, Packers,
Havana, Cuba
Notify.

B/L Number 1

If consigned to order, Bill of Lading must show party to be notified. Otherwise carrier not responsible for delay and expense when effecting delivery.

[fol. 51]

Marks and Numbers (As Given by Shipper)	Quantities	Shipper's Description of Goods	Shipper's Weight and Measurements Cu. Feet Pounds Kilos
Luis A. Noboa N. Arroz Canilla Swift & Co. Cienfuegos Product of Ecuador 46 K/B. 45, 65 K/N.	7,500	Sacos de Arroz Ecuador Canilla, Cosecha Vega y/o Invierno, con 15/20% de granos quebrados y maximo 2% manchados, de buena calidad. Not responsible for weight or quality. All dock charges against cargo port of destination for account cargo.	345.000 K/B.

This bill of lading shall have effect subject to the carriage of goods by Sea Act of the U. S. A. and the carrier and the ship shall be entitled to all of the rights and immunities set forth in said act. To the extent that any term of this bill of lading is repugnant to or inconsistent with anything in such Act, it shall be void. Any Provisions herein to the contrary notwithstanding. Goods may be received and/or delivered by the Carrier at Ship's Tackle and receipt and/or delivery beyond Ship's Tackle shall be entirely at the option of the carrier and solely at the expense of the shipper and consignee.

[fol. 52]

Rates, Weight and/or Measurements Subject to Correction, and additional freight charges due at destination accordingly.

If required by the ship-owner, one signed bill of lading, duly endorsed, must be surrendered on delivery of goods.

In Witness Whereof, the Agents of said Vessel have signed 3 Bills of Lading, one of which Bills of Lading being accomplished the others to stand void. The shipper also has signed this bill of lading.

It is Hereby Certified That The Goods Are On Board The Ship.

Dated at Guayaquil this 7 day of January 1948.

Keene Line,

By .....

Freight Charges in U. S. Dollars

..... @ .... Per .....

345,000 KB. AUS $16,00 per 1000 K.,

US $5,520.00

Surcharges

Prepaid

Mexican Tax .....

Total .....

All of the above provisions and the conditions on the back hereof are hereby agreed to by the Shipper and the person delivering said merchandise to the Carrier for shipment is authorized to sign this Bill of Lading for the Shipper, and every holder hereof shall be held bound thereby whether same be signed or unsigned by the Shipper.

p.p. Luis A. Noboa N.

.....

Shipper

Non Negotiable Copy

[fol. 53]

Mexican Ports

Ensenada
Guaymar
Yavaros
Topolobampo
Mazatlan
Manzanillo
San Jose del Cabo
Puerto Vallarta

"EXHIBIT B".

Keene Line
111 West 7th St., Los Angeles, Calif.

Agents for
Cia. Naviera Del Pacifico, S. A.

California Ports

San Francisco
Los Angeles
Long Beach
San Diego

Shipper—Luis A. Noboa N.
Vessel—Cali
Shipped from—Guayaquil
Consigned To—Order Of Shippers

Voyage Number
Port of Discharge—Santiago De Cuba, Cuba

B/L Number 1

Swift & Company, Packers,
Habana, Cuba.

Notify.

If consigned to order, Bill of Lading must show party to be notified. Otherwise carrier not responsible for delay and expense when effecting delivery.

[fol. 54]

Marks and Numbers (As Given by Shipper)	Quantities	Shipper's Description of Goods	Shipper's Weight and Measurement Cu. Feet Pounds Kilos
Luis A. Noboa, N. Arroz Canilla Swift Co. Santiago De Cuba Product of Ecuador 46 K/B. 45, 65 K/N.	7,500	Sacos de Arroz Ecuador Canilli, Cosecha Vega y/o Invierno, con 15/20% de granos quebrados y maximo 2% manchados, de buena calidad. Not responsible for weight or quality. All dock charges against cargo port of destination for account cargo.	345.000 K/B.

This bill of lading shall have effect subject to the carriage of goods by Sea Act of the U. S. A. and the carrier and the ship shall be entitled to all of the rights and immunities set forth in said Act. To the extent that any term of this bill of lading is repugnant to or inconsistent with anything in such Act, it shall be void. Any Provisions herein to the contrary notwithstanding. Goods may be received and/or delivered by the carrier at Ship's Tackle and receipt and/or delivery beyond Ship's Tackle shall be entirely at the option of the carrier and solely at the expense of the shipper and consignee.

[fol. 55]

Rates, Weight and or Measurements Subject to correction, and additional freight charges due at destination accordingly.

If required by the ship-owner, one signed bill of lading, duly endorsed, must be surrendered on delivery of goods.

In Witness Whereof, the Agents of said Vessel have signed 3 Bills of Lading, one of which Bills of Lading being accomplished the others to stand void. The shipper also has signed this bill of Lading.

It Is Hereby Certified That The Goods Are On Board The Ship.

Dated at Guayaquil this 7 day of January 1948.

Keene Line,

By .....

Freight Charges in U. S. Dollars

..... @ ..... Per .....

345,000 KB. aUS $16,00 per 1000L.,

US $5.520.00

Surcharges

Prepaid

Mexican Tax .....

Total .....

All of the above provisions and the conditions on the back hereof are hereby agreed to by the Shipper and the person delivering said merchandise to the Carrier for shipment is authorized to sign this Bill of Lading for the Shipper, and every holder hereof shall be held bound thereby whether same be signed or unsigned by the shipper.

p.p. Luis A. Noboa N.

Shipper

Non Negotiable Copy

[fol. 56]

Mexican Ports

Ensenada
Guaymar
Yavaros
Topolobampo
Mazatlan
Manzanillo
San Jose del Cabo
Puerto Vallarta

"EXHIBIT C".

Keene Line
111 West 7th St., Los Angeles, Calif.

Agents for
Cia. Naviera Del Pacifico, S. A.

California Ports

San Francisco
Los Angeles
Long Beach
San Diego

Shipper—Luis A. Noboa N.
Vessel—Cali
Shipped From—Guayaquil
Consigned To—Order Of Shippers

Voyage Number
Port of Discharge—Santiago De Cuba, Cuba
Cia. Industrial y Comercial Casal S. A.—Santiago De Cuba, Cuba.
Notify.

B/L Number 2

If consigned to order, Bill of Lading must show party to be notified. Otherwise carrier not responsible for delay and expense when effecting delivery.

[fol. 57]

Marks and Numbers (As Given by Shipper)	Quantities	Shipper's Description of Goods	Shipper's Weight and Measurement Cu. Feet Pounds Kilos
Luis A. Noboa N. Arroz Canill Comercial Santiago De Cuba Product of Ecuador 46 K/B. 45, 65 K/N.	1,000	Sacos de 100 libras brutas cada uno, de arroz Ecuatoriano "Canilla" de buena calidad, con 15 20% de granos quebrados y no mas de 2% manchados. Not responsible for weight or quality. All dock charges against cargo port of destination for account cargo.	46 000 K B.

This bill of lading shall have effect subject to the carriage of goods by Sea Act of the U. S. A. and the carrier and the ship shall be entitled to all of the rights and immunities set forth in said Act. To the extent that any term of this bill of lading is repugnant to or inconsistent with anything in such Act, it shall be void. Any Provisions herein to the contrary notwithstanding. Goods may be received and/or delivered by the carrier at Ship's Tackle and receipt and or delivery beyond Ship's Tackle shall be entirely at the option of the carrier and solely at the expense of the shipper and consignee.

[fol. 58]

Rates, Weight and or Measurements Subject to correction, and additional freight charges due at destination accordingly.

If required by the ship-owner, one signed bill of lading, duly endorsed, must be surrendered on delivery of goods.

In Witness Whereof, the Agents of said Vessel have signed 3 Bills of Lading, one of which Bills of Lading being accomplished the others to stand void. The shipper also has signed this bill of Lading.

It Is Hereby Certified That The Goods Are On Board The Ship.

Dated at Guayaquil this 7 day of January 1948.

Keene Line,

By .....

Freight Charges in U. S. Dollars

..... @ ..... Per .....

46.000 KB a US $16,00 per 1000 K. US $736.00

Surcharges

Prepaid

Mexican Tax .....

Total .....

All of the above provisions and the conditions on the back hereof are hereby agreed to by the Shipper and the person delivering said merchandise to the Carrier for shipment is authorized to sign this Bill of Lading for the Shipper, and every holder hereof shall be held bound thereby whether same be signed or unsigned by the shipper.

p.p. Luis A. Noboa N.

Shipper

Non Negotiable Copy

[fol. 59] (Translation of Certificate of Registry of Steamship Caribe)

Republic of Colombia

Administration of the Customs of Barranquilla

Certificate of Registry Number 29. (Register "M.C-266"

I, Efrain del Toro, Administrator of the Customs of Barranquilla, declare: that having come before me Mr. Eulogio Echeverri, Sub-Manager of the "Compania Colombiana del Caribe, S. A.", requesting registration of the vessel named "Caribe", which is a property of the above mentioned company, as shown on legal instrument No. 4 extended by the Colombian Consul in Panama, Rep. of Panama, which was warranted and registered as Colombian at the port of Buenaventura, as per Register No. 92, which is of no further value as of this date, and the vessel having not suffered any alterations in its structure which is as follows: Iron hull constructed in the year 1917 with plates of 5/8" on the hull 3/4" on the sides; 2 Holds with 4 hatchways; 8 booms of 5 tons each; 8 winches; 2 masts; 1 deck; 1 bridge; Length 235'; *Berth* 33'; Depth 15'08"; Mean Draft 15'03"; Net Tonnage 619-50; Gross Tonnage 1.067-80; Carrying capacity 1.646-30 tons; Propulsion: 1 alternate engine with triple expansion; 3 cylinders; Power Capacity 900 H.P., with 30 years of age; constructed by Stavenger Stoberi & Dock-A/S-Norway, in 1917; 2 boilers with a pressure of 170 lbs.; burns Fuel Oil; Speed 10 knots per hour; Revolutions 95; 2 electric plants, one 6 KW the other 10 KW; 1 Rudder; 1 radio station with long and short [fol. 60] wave; 1 Radio direction finder; Fire fighting equipment; 2 life-boats—one with motor—with capacity for 35 per-ons each; Cruising Radius 3.840 miles; tanks for 1.100 barrels of fuel; it is equipped to render cargo service for which it is intended.

In view of the aforesaid there is extended.

Certificate of Registry,

to the vessel named "Caribe", this 4th day of March 1948.
(Sgd.) Efraim Del Toro, The Administrator. (Sgd.) Alfredo S. Bolivar, The Secretary.

Office of the Atlantic Department.—Barranquilla, March 5, 1948/—

Signature affixed to the back of this instrument is authenticated as corresponding to that of Mr. Efriam del Toro who actually performs the duties of Administrator of the Customs in Barranquilla.

(Sgd.) Jose M. Blanco Nunez, The Governor of the Department. (Sgd.) Sebastian M. Alcala, C., Government Secretary.

[fol. 61] Republic of Colombia,
Department of Atlantico,
City of Barranquilla,

Consulate of the United States of America, ss:

I, Nona L. Gardiner, Vice Consul of the United States of America at Barranquilla, Republic of Colombia, duly commissioned and qualified, do hereby certify that Jose M. Blanco Nunez, whose signature and official seal are respectively subscribed and affixed to the annexed certificate, was on the fifth day of March, 1948, the day of the date thereof, Governor of the Department Atlantico, Republic of Colombia, to whose official acts faith and credit are due.

For the contents of the annexed instrument, the Consulate assumes no responsibility.

In Witness Whereof I have hereunto set my hand and official seal this fifth day of March, 1948.

(S.) Nona L. Gardiner, Vice Consul of the United States of America. (There is a Seal.)

Service No. 336, Item 31. Fee $2.00 United States currency equals 3.60 pesos Colombian currency.

(There is a $2.00 Stamp Affixed with the Date of Mar. 5, 1948.)

[fol. 62] Ascanio Mulford

Box 183, Panama, R. P.

Subject:

Individuals having domicile in the Republics of Colombia and Cuba, who claim to be creditors of the Compania Transmaritima Colombiana S. A., constituted and having its domicile in Colombia, in concept of losses suffered in the shipwreck of the vessel Cali, property of the above company, which shipwreck occurred in Cuban territorial waters, have brought before the Courts of justice of the Canal Zone, on the seventh of this month, a sequestration claim against the vessel "Alacran", which belonged to the Transmaritima Colombiana and which had been sold on the 25th of February of this year, by legal instrument issued before the Consul of Colombia in Panama to the Compania Colombiana del Caribe, S. A., who named the vessel "Caribe" and under this name it was registered in the Colombian port of Barranquilla on the 4th of March.

The claim was later modified in the way of directing it against Compania Colombiana del Caribe, S. A., and against the vessel Caribe which was moored at one of the Balboa piers, coming from Barranquilla in transit to the Colombian port of Buenaventura, when it was detained by Canal Zone authorities.

It Is Desired to Know:

1. If the transfer of the vessel can be considered as fraudulent as it is claimed by the claimants, in accordance with the Colombian laws; and

[fol. 63] 2. If the Canal Zone Courts of justice have complete jurisdiction to judge the claims of the Cuban and Colombian creditors against two companies of Colombian nationality and having legal domicile in Colombia.

Opinion

1. So that the negotiations carried out by merchants may prove to be fraudulent and punishable according to the penal laws (Arts. 810 to 815 of the Penal Code), it is necessary that a fraud be involved in same, that is, the manifest intention of causing a damage to some other party in his property.

According to Art. 1516 of the Colombian Civil Code, the fraud is not presumed in cases other than those foreseen by the law and in any other cases it has to be proved.

It is not enough then to presume as it is done by the claimants, that the Compania Transmaritima sold the vessel, to evade commercial responsibilities resulting from the losses occurred in the shipwreck of the vessel "Cali", but it is necessary to prove that when the sale was made, there were claims or notifications in the Court against them, due to such losses.

Commercial laws also consider as fraudulent and inefficient of right with respect to the creditors of the bankrupt person, all contracts made by him within the thirty (30) days preceding bankruptcy and having for a purpose the gratuitous transfers, constitution of endowments to their own children, concessions or transfers in payment of debts not due, constitution of conventional mortgages and donations among persons living; but in order that these effects [fol. 64] may be produced in the contracts, a previous declaration of bankruptcy is necessary, and also that the date to which all effects have to be brought back be set forth.

Since the Compania Transmaritima Colombiana, S. A., has not relinquished the regular payment of its obligations, nor are there any news that it has been declared in bankruptcy by any Court, the effects *ipso jure* which are produced by the previous operations have no reason of being and, therefore, the sale which was effected is considered legal. (See Arts. 159 and 160 of the Colombian Land Commercial Code.)

Also, according to Art. 161 of the same Code, there can be annulled, at the creditors' request, on presentation of proof, that it was done in fraud of their rights, the transfers made through payment of real estate during the month preceding the declaration of bankruptcy; but as it has already been said, such annulments are subject to a previous declaration of bankruptcy, because they are limited to the thirty (30) days preceding the date of same.

The two companies could carry out the mutual contract of the vessel "Alacran" on the 25th day of February 1948 in a bona fide manner, as set forth in Article 1603 of the Colombian Civil Code, because on this day there did not exist any claim against the Company making the sale.

The fraudulent quality of this operation can only be appreciated according to what the Colombian legislation

prescribes because this was what was taken into consideration when the contract was entered into and because both companies are subject in their commercial relations to the jurisdiction of the Colombian Courts of justice.

Therefore, if the sale does not turn out as being fraudulent in accordance with the Colombian law, no other law [fol. 65] can qualify it as such, as it would imply an usurpation of jurisdiction and sovereignty.

Finally, in accordance with Art. 20 of the Colombian Maritime Commercial Code, the claimants seem to be privileged creditors, but privileged creditors of the vessel Cali during the shipwreck of which they lost some cargo. They are not, then, creditors of the "Alacran" which cannot be prosecuted by them.

And even as far as the vessel Cali is concerned, in order that these creditors may enjoy the privileges granted by Article 20, they should prove their credit, as set forth in Article 24, Ordinal 10, with a judicial or arbitrary sentence which would declare them as creditors in view of the bills of lading or of the written contracts.

Second Question: Jurisdiction.

In my opinion, the Courts of justice of the Canal Zone are absolutely incompetent to decide regarding a claim of this nature, for the following reasons:

(a) In almost all the legislations in the world, the knowledge of jurisdiction to judge a claim is determined by the domicile of the debtor or defendant, except when there has been expressly another arrangement;

(b) In the claim that has been proposed before the Courts of justice of the Zone, the claimants have expressed that the two defendants have their domicile in Colombia and if they had not said so, it would be very easy to prove it with the presentation of their respective deed of incorporation;

[fol. 66] (c) Protection to the nationality could not be alleged, because one of the claimants is of northamerican nationality, as are the Courts of justice of the Zone, because that institution is not domiciliated in the Canal Zone or any other territory under the jurisdiction of the United States. The Swift Company Packers to which I refer, appears on the bill of lading as consignee in Habana, Cuba, and not in Nevada, U. S. A.

(d) Because the place where the shipwreck of the vessel Cali occurred (a place near Grand Cayman Island) is not under the jurisdiction of the United States or the Republic of Cuba. Said island belongs to Great Britain.

If the Courts of justice of the Canal Zone would accept the claim of the creditors having domicile in Cuba and Colombia, they would assume a right not granted by the American Laws, customary laws, or the Code of International Private Law, signed in the VI Conference of Habana of 13 February 1928 by Cuba, the U. S. and Colombia, among other nations.

Among the pertinent dispositions of this Code, I cite the following which are applicable to the present case:

Art. 323. Aside from the cases of expressed or understood submission and except where there is a local law to the contrary, a competent judge for the exercise of personal actions will be that of the place where the obligation is to be fulfilled, this failing, that of the domicile of the defendants, and then that of his residence.

Art. 277. The rights of the creditors are regulated by the law of the flag, after the sale of the boat, and the extinction of same.

[fol. 67] Based on the previous dispositions and arguments, I am of the opinion that the Courts of justice of the Canal Zone completely lack jurisdiction to make a decision on the claim against "Compánias Transmaritima Colombiana S. A." and "Colombiana del Caribe S. A."

I have expressed this opinion in my capacity as lawyer, having obtained my degree from the University of Cartagena, Colombia, having exercised my profession for more than 20 years in the City of Cartagena, Colombia, and more than 7 years in Panama, Republic of Panama.

Panama, 13 March 1948.

Ascanio Mulford.

NOTICE OF SPECIAL APPEARANCE AND EXCEPTION TO JURISDICTION—Filed March 24, 1948

[Title omitted]

SIRS:

Please take notice that the Respondent Compania Colombiana Del Caribe, S. A., by its proctors, Van Siclen & Ramirez, hereby appears in this suit specially and solely for the purpose of contesting the jurisdiction of this Court, and for no other purpose.

1. This Court should decline jurisdiction because this suit is in personam and entirely between foreigners and no valid reason is set forth in the Libel why this Court should entertain jurisdiction.

[fol. 68] 2. This Court has no jurisdiction of the question of alleged fraud raised by Libelants in the Supplemental and Amended Libel.

3. The Attachment should be vacated for the reason that the Bond for Security for costs given by the Libelants did not comply with the Admiralty Rules.

Dated: Ancon, Canal Zone, March 24, 1948.

Yours, etc. Van Siclen & Ramirez, Proctors for Compania Colombiana del Caribe, S. A., appearing specially and solely for the purposes above stated

P. O. Box 124, Ancon, C. Z.

To: McGrath, Sheridan & Thomas, Deutsch, Kerrigan & Stiles, Proctors for Libelant. C. T. McCormick, Jr., Esq., Clerk.

NOTICE OF SPECIAL APPEARANCES AND EXCEPTIONS TO JURISDICTION

[Title omitted]

SIRS:

Please take notice that the Respondent, Compania Trans-Maritima Colombiana, S. A., by its proctors, Van Siclen & [fol. 69] Ramirez, hereby appears in this suit specially and

solely for the purpose of contesting the jurisdiction of this Court, and for no other purpose.

1. This Court should decline jurisdiction because this suit is in personam and entirely between foreigners and no valid reason is set forth in the Libel why this Court should entertain jurisdiction.

2. This Court has no jurisdiction of the question of alleged fraud raised by Libelants in the Supplemental and Amended Libel.

3. The Attachment should be vacated for the reason that the Bond for Security for costs given by the Libelants did not comply with the Admiralty Rules.

Dated: Ancon, Canal Zone, March 24, 1948.

Yours, etc. (Sgd.) Van Siclen & Ramirez, Proctors for Compania Transmaritima Columbiana, S. A., appearing specially and solely for the purpose above stated.

P. O. Box 124, Ancon, Canal Zone.

To: McGrath, Sheridan & Thomas, Deutsch, Kerrigan & Stiles, Proctors for Libelant. C. T. McCormick, Jr., Esq., Clerk.

[fol. 70] Filed Mar. 24, 1948 in the office of the Clerk of the U. S. District Court for the Canal Zone.

C. T. McCormick, Jr., Clerk, by Lois E. Harrison, Deputy Clerk.

ORDER OVERRULING MOTION OF RESPONDENTS FILED ON MARCH 15, 1948

[Title omitted]

On March 15, 1948, proctors for respondents filed notice that on March 22, 1948 respondents would in the Court-house at Ancon, Canal Zone apply for an order of this Court declining jurisdiction here and vacating the attachment heretofore made. The grounds of the motion were as follows:

(a) That the suit is between foreigners

(b) Because it appears from the face of the libel that the S. S. Caribe is in no way responsible for the damage demanded in the libel.

(c) No sufficient cause has been alleged why this Court should hear this matter.

(d) Because the bond furnished with the Stipulation for costs does not conform with the requirements of the Admiralty rules.

[fol. 71] (e) Because the alleged fraudulent transfer is a matter to be determined and decided under the laws of the forum where such transfer was made.

The Court being advised of this notice and motion directed the Clerk of this Court by cable to request respondent's proctors to immediately file a brief in support of its motion and to furnish adversary proctors a copy of same. The Court then directed proctors for the libelants that if they had objections to file motion and memorandum brief in support of same.

The Court was advised by Mr. Harry F. Stiles, Jr. proctor for libelants, that he would immediately file memorandum brief in support of his objections to the motion as soon as he had received a copy of the respondent's memorandum brief. All papers, memorandums and briefs were to be forwarded to the Court at Mayfield, Kentucky.

The Court received from the Clerk all necessary papers and on Saturday, March 27th, received from respondents memorandum in support of its motion. On March 30th, the Court received a telegram from Libelants' proctor, Stiles, that he had mailed libelants' memorandum special delivery; but same has not been received.

After receiving respondents' memorandum, the Court has diligently investigated the law and procedure herein and, after considering the pleadings, exhibits, the motion and memorandum in support of same, has arrived at the conclusion that the motion of respondents cannot be sustained at this time and on this showing.

It is, therefore, ordered that said motion be and same is hereby overruled with objections and exceptions to the respondents and, without prejudice to the respondents fil- [fol. 72] ing any further motions that they may desire to file and without matters contained in the motion being considered upon the trial of this action.

The Court further reserves the right to file a memorandum giving his reasons for its actions herein.

It is further ordered that if respondents desire, they may submit any objections they may have to the bond or the surety of same by procedure as set forth in this Court's Admiralty rules, and that the respondents may proceed in accordance with the Admiralty rules to request the Court to fix the amount of the bond for the release of the vessel.

(Signed) Bunk Gardner, Judge.

Done at Mayfield, Kentucky, this 31st day of March, 1948.

Received by mail and Entered of record April 3, 1948, Minute Order Book 29 Page 354.

C. T. McCormick, Jr., Clerk of Court, by ——, Deputy Clerk.

[fol. 73] STIPULATION—Filed April 16, 1948

[Title omitted]

It Is Hereby Stipulated And Agreed By and between the Proctors for the respective parties hereto, that the Respondents Campania Transmaritima Columbiana, S. A. and Compania Colombiana Del Caribe, S. A. have until and including May 17, 1948, to answer the libel and interrogatories herein.

Dated: April 14, 1948.

McGrath, Sheridan & Thomas, (S.) by Daniel E. McGrath, Of Proctors for Libelants. Van Sielen & Ramirez, (S.) by Charles E. Ramirez, Of Proctors for Respondents.

P. O. Box 124, Ancon, C. Z.

STIPULATION—Filed May 27, 1948

[Title omitted]

It Is Hereby Stipulated And Agreed by and between the Proctors for the respective parties hereto, that the Respon-
[fol. 74] dents Compania Transmaritima Columbiana, S. A.

and Compania Colombiana Del Caribe, S. A. have until and including June 17th, 1948, to answer the libel and interrogatories herein.

Dated May 12, 1948.

McGrath, Sheridan & Thomas, (S.) by Daniel E. McGrath, Of Proctors for Libelants. Van Siclen & Ramirez, (S.) by Charles E. Ramirez, Of Proctors for Respondents.

P. O. Box 124, Ancon, C. Z.

ANSWER TO LIBEL OF COMPANIA TRANSMARITIMA COLUMBIANA, S. A.

[Title omitted]

The answer of respondent Compania Transmaritima Columbiana, S. A., answering the libel and amended and supplemental libel of Swift & Co., et al, in an alleged cause of cargo shortage and or damage, civil and maritime, alleges:

First: It denies that it has any knowledge or information sufficient to form a belief as to any of the matters alleged in Articles I, V, and VIII of the libel.

Second: Denies each and every allegation of Articles IV, VII, and IX of the libel.

[fol. 75] Third: Denies each and every allegation contained in Art. III of the libel except that it admits that on or about the 7th day of January 1948 respondent received certain quantities of rice from libelants, said to consist of (a) 7500 bags of rice of a weight and quality not guaranteed by respondent to be carried to Cienfuegos, Cuba; (b) 7500 bags of rice of a weight and quality not guaranteed by respondent to be carried to Santiago de Cuba, Cuba, both according to the terms and conditions of bills of lading issued therefor by respondent.

Fourth: Denies each and every allegation contained in Article VI of the libel except that respondent admits it received certain quantities of rice in bags from libelants of a weight and quality not guaranteed by respondent, to

be carried to the ports mentioned and according to terms and conditions of the bills of lading issued therefor by respondent.

Fifth: Admits each and every allegation contained in Article II of the libel.

Sixth: Upon information and belief denies each and every allegation contained in Articles II, III, IV, and V of the amended and supplemental libel.

Seventh: Further answering the libel and as a further and separate defense thereto, the respondent, realleging all the matters hereinbefore set forth, further alleges that at all the times mentioned in the libel and amended and supplemental libel the M V Cali was engaged on transportation of merchandise to and from ports of the Republic [fol. 76] of Colombia, and that her owners prior to the commencement of the voyage of January 7, 1948, exercised due diligence to make her seaworthy and properly manned, equipped and supplied at the beginning of the voyage. Respondent is entitled to all exemptions and defenses provided for in Section 1304 of the Act of Congress approved April 16th, 1936, known as the Carriage of Goods by Sea Act.

Eighth: Further answering the libel and as a further and separate defense, thereto, respondent further alleges on information and belief, as follows:

The bills of lading issued for the carriage of the shipments referred to in the libel contain among others the following provisions:

"The carrier shall not be liable, as Carrier or otherwise, for any loss, damage, delay or default, whether occurring during transit or before, or after, or during, or while awaiting loading; transhipment, discharge, delivery or other disposition of the Goods, or on board or in lighters or craft, or on cars, or on wharf, or in warehouse or elsewhere at any port or place, occasioned by any of the following Excepted Causes, throughout this Contract always excepted. By causes beyond the Carrier's reasonable control; by dangers, accidents or perils of the sea or other waters and navigation or transportation of whatsoever nature or kind; * * * by Act of God, by enemies, pirate,

robbers or thieves; * * * by prolongation of voyage; * * * by any latent or other defect in hull, machinery or appurtenances of Vessel or any craft or unseaworthiness thereof, [fol. 77] although existing at the time of shipment, or transhipment or at the beginning of the voyage, provided due diligence shall have been exercised to make the same seaworthy; by collision, stranding, jettison, wreck or other accident of any kind whatsoever, incident to navigation; * * * by faults or errors in navigation, management or control of the Vessel or her engines, boilers, machinery, pumps, winches or other appliances or appurtenances, provided due diligence shall have been exercised to make the Vessel in all respects seaworthy and to have her properly manned, equipped and supplied; * * *"

Due diligence was exercised to make the said vessel seaworthy and properly manned and equipped and supplied at the beginning of the voyage.

Upon information and belief, any damage sustained by the goods referred to in the libel while in the custody of the owners and operators of the vessel or of the respondent was not caused or contributed to by any fault or neglect on the party of the respondent or on the part of the vessel but was the result of causes excepted in the bills of lading herein above set forth. If any of said damage was the result of negligence of the officers or crew or other agents of the respondent or of the vessel, such negligence consisted of faults or errors in navigation or in the management of the vessel, for which respondent or the owner of the vessel is excused from liability under the appropriate section of the Carriage of Goods by Sea Act.

Ninth: Further answering the libel and as a further separate defense, respondent herein alleges, on information and belief as follows:

[fol. 78] That prior to the institution of this suit, respondent delivered or caused to be delivered to the Receiver of Wreck of Grand Cayman, the rice saved from the M V "Cali", for the account and at the request of the cargo insurers of the libelants and upon information and belief, that said rice was sold for and on behalf of said cargo insurers for the total sum of One Hundred and Seventy-five Thousand and 00/100 Dollars ($175,000) and that the

bill of lading contains among others, the following provision:

"If Carrier becomes liable for any damage to or loss of said Goods it shall have the benefit of all insurance on said Goods and of any payments made by or on behalf of the insurer thereof whether under the guise of advances, loans or otherwise; and shall also have the benefit of all loans, the amounts of which have been determined by the total amount or part of any loss or damage to said Goods made to the Owner by the insurer thereof, and induced by the existence of insurance upon said Goods; and which are made repayable only in the event recovery of said — or damage is had from the Carrier or said Vessel. The right to any such insurance, advances or loans may be offset in the amount thereof by Carrier against a claim or suit for said loss or damage."

Tenth: Further answering the libel and amended and supplemental libel herein, respondent alleges as a further defense, that the S S Caribe, was not at the time of the filing of the libel herein the property of the respondent; that prior to the institution of this suit respondent, Compania Transmaritima Columbiana, S. A., sold and transferred said ship under the laws of the Republic of Colombia, to Compania Colombiana del Caribe, S. A., and further, upon information and belief, that said sale or transfer was and is legal under the laws of the Republic of Colombia pertinent thereto, which said laws will be offered to the Court upon the hearing of this libel.

[fol. 79]

Eleventh: Further answering the libel respondent alleges as a further and separate defense thereto that the loss if any, sustained by the libelants was occasioned without the privity or knowledge of the respondent; the amount of the damages alleged in said libel greatly exceeds the amount or value of respondent's interest in the M V Cali and her pending freight as of the termination of the voyage on which the alleged losses were sustained and respondent invokes the benefit of the provisions of the Revised Statutes of the United States and the acts amendatory thereof and supplemental thereto in limitation of the liability of shipowners, under which provisions, should the respondent be held liable for or by reason of the matters, or any of them, set forth in the libel, respondent's liability is lim-

ited to the amount or value of the respondent's said interest in said vessel and her freight then pending as of the termination of her said voyage.

Wherefore, respondent prays:

1. That the libel be dismissed with costs.

2. That the Court decree that the respondent herein is not the owner of the S/S "Caribe".

[fol. 80] 3. That the liability of the respondent if any, be limited to the amount or value of its interest in the M/V "Cali", and her pending freight.

4. That credit be given to the respondent for the amount received for the sale of rice at Grand Cayman, for and on behalf of the underwriters of the cargo for the libelants.

5. That respondent have such other and further relief as may be just.

(S.) Van Siclen & Ramirez, by Charles E. Ramirez,
Of Proctors for Respondent, Compania Transmaritima Columbiana, S. A.

State of New York,
County of New York, ss:

Charles E. Ramirez being duly sworn deposes and says that:

He is a member of the firm of Van Siclen and Ramirez, proctors for the respondent, Compania Transmaritima Columbiana, S. A., herein; that he has read the foregoing answer and knows the contents thereof; that the same is true to the best of his knowledge except as to matters therein stated to be alleged upon information and belief and as to those matters he believes them to be true.

That the sources of his information and the grounds for his belief as to the matters therein stated upon information [fol. 81] and belief are communications received from respondent, Compania Transmaritima Columbiana, S. A., and their agents and from documents and papers in his possession as one of the proctors for the respondent, Compania Transmaritima Columbiana, S. A., for the reason that, Compania Transmaritima Columbiana, S. A., the re-

spondent herein, is a foreign corporation none of whose officers is within the jurisdiction of this Court.

(S.) Charles E. Ramirez, Of Proctors for Respondent, Compania Transmaritima Columbiana, S. A.

Subscribed and sworn to before me, this 4th day of June, 1948. Edmund E. Kelly, Notary Public, State of New York, Residing in New York County, N. Y. Co. Clk's No. 254, Reg. No. 440-K-O Kings Co. Clk's No. 198, Reg. No. 332-K-O. Commission Expires Mar. 30, 1950.

Filed June 11, 1948, in the office of the Clerk of the U. S. District Court for the Canal Zone.

C. T. McCormick, Jr., Clerk.

Certificate of Archibald R. Watson, County Clerk and Clerk of the Supreme Court, New York County, certifying Edmund E. Kelly is a Notary Public, attached to original.

[fol. 82] ANSWER TO LIBEL OF COMPANIA COLOMBIANA DEL CARIBE, S. A.

[Title omitted]

The answer of respondent Compania Colombiana del Caribe, S. A., answering the libel and amended and supplemental libel of Swift & Company, et al., in an alleged cause of cargo shortage and/or damage, civil and maritime, alleges:

First: It denies that it has any knowledge or information sufficient to form a belief as to any of the matters alleged in Articles I, II, III, IV, V, VI, VII, VIII, and IX of the libel.

Second: Denies that they have sufficient information to form a belief as to the matters contained in Article I of the amended and supplemental libel.

Third: Denies each and every allegation contained in Articles II, III, IV, and V of the amended and supplemental libel.

Fourth: Further answering the amended and supplemental libel the respondent alleges that prior to the insti-

tution of this suit the respondent Compania Colombiana del Caribe, S. A. was organized under and by virtue of the laws of the Republic of Colombia and that subsequent to its incorporation and prior to the institution of the suit herein, the said respondent Compania Colombiana del Caribe, S. A. purchased, under the laws of the Republic of Colombia, the S/S "Alacran" from the Compania Trans- [fol. 83] maritima Columbiana, S. A., and changed or caused to be changed the register of the said S/S "Alacran" under the laws of the Republic of Colombia and the vessel "Alacran" was renamed and designated the "Caribe".

Fifth: That at the time that this suit was instituted and the "Caribe" was attached by the United States Marshal for the District of the Canal Zone, the said vessel "Caribe" was and still is the property of the respondent claimant Compania Colombiana del Caribe, S. A.

Sixth: That the respondent claimant Compania Colombiana del Caribe, S. A. is in no way concerned with the alleged loss sustained by the libelants herein;

Wherefore, respondent claimant prays:

(1) That the libel and amended and supplemental libel herein be dismissed with costs, and,

(2) That the Court decree that the respondent claimant herein is the owner of the S/S "Caribe".

(3) That respondent have such other and further relief as to the Court may seem proper.

Van Siclen & Ramirez, (Sgd.) by Charles E. Ramirez,
Of Proctors for Respondent, Compania Colombiana
del Caribe, S. A.

[fol. 84] State of New York,
County of New York, ss:

Charles E. Ramirez being duly sworn deposes and says that:

He is a member of the firm of Van Siclen and Ramirez, proctors for the respondent, Compania Colombiana del Caribe, S. A., herein; that he has read the foregoing answer and knows the contents thereof; that the same is

true to the best of his knowledge except as to matters therein stated to be alleged upon information and belief and as to those matters he believes them to be true.

That the sources of his information and the grounds for his belief as to the matters therein stated upon information and belief are communications received from respondent, Compania Colombiana del Caribe, S. A., and their agents and from documents and papers in his possession as one of the proctors for the respondent, Compania Colombiana del Caribe, S. A., for the reason that, Compania Colombiana del Caribe, S. A., the respondent herein, is a foreign corporation none of whose officers is within the jurisdiction of this Court.

(S.) Charles E. Ramirez, Of Proctors for Respondent, Compania Colombiana del Caribe, S. A.

[fol. 85] Subscribed and sworn to before me, this 4th day of June, 1948. Edmund E. Kelly, Notary Public, State of New York, residing in New York County, N. Y. Co. clk's No. 254 Reg. No. 440-K-O Kings Co. clk's No. 193 Reg. No. 332-K-O. Commission Expires Mar. 30, 1950. (Seal.)

Filed June 11, 1948, in the office of the Clerk of the U. S. District Court for the Canal Zone.

C. T. McCormick, Jr., Clerk.

Certificate of Archibald R. Watson, County Clerk, and Clerk of Supreme Court, New York County, certifying Edmund E. Kelly is a Notary Public, attached to original.

EXCEPTIONS AND OBJECTIONS TO LIBELANTS' INTERROGATORIES BY COMPANIA COLOMBIANA DEL CARIBE, S. A.—GARNISHEE

[Title omitted]

To the Honorable Judge of the United States District Court for the District of the Canal Zone:

The exceptions and objections of Compania Colombiana del Caribe, S. A., as a garnishee, to the interrogatories of the libelants, Nos. 1 to 12 show as follows:

(1) Said interrogatories are aimed pointedly to obtain and "fish" into the evidence in support of the allegations of the answer of the interrogated claimant respondent.

7. The Amended and Supplemental Libel fails to state facts sufficient to constitute a cause of suit against Compania Colombiana del Caribe, S. A. or to entitle the libelants to the relief prayed for against it, or to justify the [fol. 91] Court in proceeding against the steamship Caribe by attachment or otherwise.

8. The subject matter of this suit is a claim for damages arising out of contracts of affreightment between Colombian citizens on a Colombian vessel, in foreign commerce between ports and places without the United States or any of its possessions.

9. The subject matter of this suit in so far as it affects the respondent Compania Colombiana del Caribe, S. A. and the steamship Caribe is an attack by the libelants upon the validity and sufficiency of a sale or transfer between two Colombian corporations made pursuant to the laws of Colombia, the validity or invalidity of which is a matter of Colombian law exclusively and which is not a matter of admiralty cognizance in the Courts of the United States.

10. The attachment and holding of the steamship Caribe herein constitutes an unwarranted interference with the domestic commerce of the Republic of Colombia.

11. It is contrary to the policy of the United States in its operation and control of the Canal to allow this Court to be used as a coercive collecting agency in litigation involving foreign commerce when the jurisdiction or right is absent or doubtful.

12. If in truth and in fact the libelant Swift & Company, Packers, is a corporation citizen of the United States and acquired any interest in the subject matter of this suit prior to loss (as to which this respondent has no knowledge and as to which it demands strict proof) the interest so acquired [fol. 92] was merely the interest of an assignee and goes to a part of the claim only, all of the other libelants being foreigners.

13. The attachment of the steamship Caribe was obtained by improper practices and with manifest want of equity.

14. The respondent Compania Colombiana del Caribe, S. A., has suffered and will continue to suffer great loss and damage because of the attachment and holding of the

steamship Caribe as to which it has no adequate remedy herein or otherwise.

The said motion will be made upon all the pleadings, process and papers filed herein and proceedings heretofore taken herein, upon the affidavit of Charles E. Ramirez, verified August 16th, 1948, hereunto annexed and upon such further proofs as may be submitted herein on or before the hearing of this motion.

Dated, Ancon, Canal Zone, August 16th, 1948.

(S.) Van Siclen & Ramirez, Proctors for Respondent Compania Colombiana Del Caribe, S. A.

P. O. Box 124, Ancon, Canal Zone.

To: C. T. McCormick, Esq., Clerk of the Court. McGrath, Sheridan & Thomas, Esqs., Deutsch, Kerrigan & Stiles, Esqs., Proctors for Libelants.

Copy received: 8/16/48. (S.) W. J. Sheridan, Jr.

[fol. 93] AFFIDAVIT

[Title omitted]

UNITED STATES OF AMERICA,
Canal Zone, ss:

Charles E. Ramirez, being duly sworn, deposes and says:

1. I am a member of the firm of Van Siclen and Ramirez, proctors for both of the respondents herein, am familiar with the proceeding heretofore had in this cause, and hereby affirm all the statements of fact contained in my affidavit verified March 15, 1948, and on file herein.

2. This affidavit is made in support of the motion of the respondent Compania Colombiana Del Caribe, S. A., for an order vacating and discharging the attachment of the steamship Caribe, and dismissing the amended and supplemental libel, notice of which is hereunto annexed. The sources of my information as to the matters and things herein stated are personal inquiry, reports to me and others by the officers and agents of the respondents, official documents or copies thereof and advices received from representatives of

[fols. 86-87] (2) That the said interrogatories refer to matters which are, in view of the supplemental and amended libel, known to the libelants.

(3) That the said interrogatories do not in any way tend to amplify and support any of the allegations contained in the pleadings of the interrogator libelants.

Van Siclen and Ramirez, (Sgd.) by Charles E. Ramirez, of Proctors for respondent Compania Colombiana del Caribe, S. A.

P. O. Box 124, Ancon, C. Z.

Filed June 11, 1948 in the office of the clerk of the U. S. District Court for the Canal Zone.

C. T. McCormick, Jr., Clerk.

[fol. 88] MOTION

[Title omitted]

SIRS:

Please take notice that upon all the papers heretofore filed herein and upon the affidavit of Charles E. Ramirez duly verified, filed August 16, 1948, the undersigned herewith moves the Court for an order vacating the attachment heretofore made herein and dismissing the amended and supplemental libel heretofore filed herein, as demanded in the Notice of Motion served herein.

Dated: August 16, 1948.

Yours, etc. (S.) Van Siclen & Ramirez, Proctors for Respondents Compania Transmaritima Colombiana, S. A., and Compania Colombiana del Caribe, S. A.

P. O. Box 124, Ancon, Canal Zone.

[fol. 89] To: C. T. McCormick, Esq., Clerk of the Court. McGrath, Sheridan & Thomas, Esq., Proctors for Libelants.

Filed August 17, 1948.

NOTICE OF MOTION TO VACATE ATTACHMENT AND DISMISS AMENDED AND SUPPLEMENTAL LIBEL. Filed August 16, 1948

[Title omitted]

SIRS:

Please Take Notice that on August 23rd, 1948, at the hour of 9 o'clock A. M. or as soon thereafter as counsel can be heard at the Court room of the above entitled Court in the United States Court House, Ancon, Canal Zone, the respondent Compania Colombiana del Caribe, S. A., will move the Court for an order vacating and discharging the attachment of the steamship Caribe, pursuant to which she is now in the custody of the Marshal of this District and dismissing the Amended and Supplemental Libel as to the respondent Compania Colombiana del Caribe, S. A., upon the following grounds, and for such other and further relief as may be just and proper:

1. The subject matter of the libelant's claims, and the relief sought, as against Compania Colombiana del Caribe, [fol. 90] S. A., is not within the admiralty and maritime jurisdiction of the United States or of this Honorable Court.

2. The Amended and Supplemental Libel fails to state facts sufficient to constitute a cause of suit against the respondent Compania Colombiana del Caribe, S. A., or against the steamship Caribe within the admiralty and maritime jurisdiction of this Court.

3. This Court is without jurisdiction in this cause to declare invalid the sale and transfer of the steamship Caribe from Compania Transmaritima Colombiana, S. A. to Compania Colombiana del Caribe, S. A., or to subject the steamship to lien or sale to satisfy any judgment renderable herein.

4. The Amended and Supplemental Libel fails to state facts sufficient to constitute a cause or justification for the attachment and holding of the steamship Caribe herein.

5. The attachment and holding of the steamship Caribe herein, was and is irregular, improper and unjustified.

6. The Court is without jurisdiction herein to proceed against the respondent Compania Colombiana del Caribe, S. A. as a garnishee.

the respondents in the United States. The matters herein stated are true to the best of my knowledge, information and belief.

3. At no time prior to the filing of the libel and the amended and supplemental libel herein and the initial attachment of the Caribe under the processes issued thereon on March 7 and 8, 1948, was any claim for damages asserted or threatened against either of the respondents by any of [fol. 94] the libelants or by anyone in their behalf, and only when they had received actual notice of the seizure of the Caribe by the Marshal did either respondent know that any claim or litigation arising out of the loss of the Cali would be asserted in this jurisdiction or elsewhere.

4. It is true that at the time of the loss of the Cali during the latter part of January, 1948, the respondent Compania Transmaritima Colombiana, S. A., was the owner of the Caribe or Alacran as she was then named. It is also true that prior to March 4, 1948, to wit, during the month of February, 1948, Compania Colombiana Del Caribe, S. A., was organized as a corporation under the laws of Colombia, that on or about February 25, 1948, the steamship Alacran was sold and transferred by Compania Transmaritima Colombiana, S. A., to Compania Colombiana Del Caribe, S. A., and that on March 4, 1948, at Barranquilla, Colombia, the register of the vessel was changed from Compania Transmaritima Colombiana, S. A., as owner, to Compania Colombiana Del Caribe, S. A., as owner, and the name of the said steamship was changed from Alacran to Caribe. All of the said transactions were made openly and were recorded in the public records of the Republic of Colombia. The instrument effecting the sale and transfer of the vessel was "public deed" No. 4 of February 25, 1948, granted before the Consul General of Colombia in Panama, Republic of Panama, and the vessel's new register or "patente", was issued to her on March 4, 1948, by the customs authorities of the port of Barranquilla, where she then lay, pursuant to Resolution No. 94 of that date. A certified copy and translation of the said register is annexed to my affidavit of March 15, 1948, which is on file herein.

[fol. 95] 5. It is not true that the transfer of ownership or the change of name of the said vessel were for the purpose of defrauding the libelants or any of them or that they

were made without adequate or valuable consideration from the buyer to the seller. The said corporations do not have and never have had identical or substantially identical officers, directors or stockholders, nor is Compania Colombiana Del Caribe, S. A., the "creature or alter ego" of Compania Transmaritima Colombiana, S. A. At all times the stockholders of each company and the number of shares held by each were and now are as follows:

Shareholder	Cia. Transmaritima	Cia. Caribe
Walter W. Keene	39 shares	18 shares
Eulogio Echeverri V.	12 shares	29 shares
Joaquin Losada	12 shares	none
Pablo Marulanda	36 shares	none
Nathaniel Mann	1 share	none
L. K. Cofer	none	1 share
William Nelson Parcells	none	1 share
Jaime Lozano Henao	none	1 share

[fol. 96] The officers, managers and directors of each company at all times were and now are as follows:

Position	Cia. Transmaritima	Cia. Caribe
Manager:	Walter W. Keene	Walter W. Keene
Chairman of the Board of Directors & First Substitute Manager:		Walter Keene, Jr.
First Principal Director & First Substitute Manager:	Nathaniel Mann	
Second Principal Director & Second Substitute Manager:	Eulogio Echeverri V.	Dr. Ricardo Jordan Jiminez
Third Principal Director & Third Substitute Manager:	Pablo Marulanda	Eulogio Echeverri V.
Sub-Manager:	Eulogio Echeverri V.	Eulogio Echeverri V.
Fiscal Auditor:	C. L. Nichols	Jose Manuel Angel Echeverri

[fol.97] Substitute Fiscal Auditor:	Jose Manuel, Angel Echeverri	Dr. Cesar Calero Mercado
Secretary:	None	Adolfo Hermaza
Substitute Directors:	None	L. K. Cofer, Jaime Lozano Henao and William Nelson Parcells

[fol. 98] 6. From the time of the loss of the Cali until the consummation of the sale aforesaid, the Alacran, under the ownership of the respondent Compania Transmaritima Colombiana, S. A., was frequently in this jurisdiction and other ports and places where she was subject to legitimate attachment proceedings, without any attempt on the part of Compania Transmaritima Colombiana, S. A., to evade any such process. Her movements between the time of the loss of the Cali and the attachments herein were as follows:

At the time of the Cali's loss, the Alacran was at Guayaquil, Ecuador, loading cargo, and shortly thereafter she sailed for Barranquilla, Colombia, and Cuban ports with general cargo. In the course of the voyage she passed through the Canal eastbound and discharged her Barranquilla cargo at that port. Having suffered damage during the voyage, she then proceeded to Cartagena, Colombia, for repairs and then returned to Cristobal for further repairs. These completed, she proceeded to Cuba, calling meanwhile at Grand Cayman, where she picked up the crew of the Cali and carried them to Cuba. At Cuba she was in the jurisdiction of the destination of the Cali cargo for several days, discharging cargo at Havana and Santiago de Cuba, after which she proceeded to Barranquilla. While there, on March 4, 1948, her registry and name were officially changed as aforesaid. Thereafter she loaded cargo for Buenaventura, on the west coast of Colombia, and with that cargo on board, reached Cristobal, where she stopped for fuel. She then started her transit of the Canal, during which she was seized and has ever since been detained under the attachments herein.

[fol. 99] 7. There was nothing secret or illegal about the incorporation of the respondent Compania Colombiana Del Caribe, S. A., or the sale and transfer to it by the respondent Compania Transmaritima Colombiana, S. A. of the S/S Alacran (now the S/S Caribe). The incorporation of the new company and the sale and transfer of the vessel were accomplished openly and notoriously and in strict compliance with the laws of the Republic of Colombia by whose laws each corporation was and is governed, whose flag the S/S Caribe has flown and under whose registry the said vessel has been operated at all material times.

8. The respondent Compania Transmaritima Colombiana, S. A., has valid defenses to the libelant's claim.

Further, even if, upon the trial of this action, the Court should find that the alleged loss and damage were due to any fault or negligence of the agents, servants and employees of the respondent Compania Transmaritima Colombiana, S. A., for which the said respondent was liable, its liability would be limited, under the applicable statutes to the value of the wreck of the M/V Cali and the earnings of the voyage on which she was engaged at the time of the loss, since the accident was not due to causes within the privity of knowledge of the said respondent. The gross earnings of the voyage were in the neighborhood of $20,000 and the value of the wreck was little more than nominal.

9. As far as appears from his return, the Marshal made no attempt whatsoever to serve process on the respondent Compania Transmaritima Colombiana, S. A., before attach-[fol. 100] ing the S/S Caribe. In fact, the original libel was filed on March 7, 1948, which was a Sunday and the attachment under that libel was levied on the next day.

10. On April 29, 1948, libelants filed another libel on the same cause of action in the United States District Court for the Southern District of New York against the respondent Compania Transmaritima Colombiana, S. A., again alleging that *it* was the carrier and that *it* "owned, operated, managed, chartered and/or otherwise controlled the M/V Cali" and again praying for an attachment of the said respondent's property. Thereafter, on May 20, 1948, they filed an amended libel in the same suit, adding as parties respondent "Keene Line, a corporation, and Walter W. Keene individually and doing business under the firm name and style of Keene Line". The amended libel alleged that the "*respondents* owned, operated, managed, chartered and/or otherwise controlled the M/V Cali" and prayed for an attachment of funds belonging to *both* of the respondents.

11. Still another suit was filed and another attachment sought by the same libelants on or about July 28, 1948, in the United States District Court for Southern District of Texas (Galveston Division). This time they sued "Walter W. Keene (also known as W. W. Keene), an individual, and as an individual doing business under the fictitious firm name and style of Keene Line and/or

Compania Transmaratima Colombiana, S. A. and Compania Transmaritima Colombiana, S. A., a corporation". In the Texas libel, libelants allege, in one article, that Walter W. Keene was the carrier, and that *he* "owned and/or oper-
[fol. 101] ated and/or controlled the M/V Cali". In the next article they allege that Compania Transmaritima Colombiana, S. A., was "a corporate shell, being in reality the creature of Walter W. Keene" and that *it* was the carrier and that *it* "owned and/or operated and/or controlled the Motor Vessel Cali".

12. By reason of the attachment of the S/S Caribe, the respondent Compania Colombiana Del Caribe, S. A., has been put to great expense. It was obliged to trans-ship the Colombiana inter-coastal cargo which the vessel was carrying at the time of her seizure and to repatriate her crew. The said respondent neither owns nor operates any other vessel and as a result of the detention of the Caribe, which has already lasted approximately four and a half months, it has been forced to refuse numerous offers of business. It has lost its contacts with a number of shippers and in some instances may never be able to regain them. It has thus suffered and is continuing to suffer irreparable harm, for which it has no adequate remedy. It is still expending very substantial sums for the up-keep of the vessel, and at the same time it is earning no income out of which these expenses can be paid.

Wherefore, deponent respectfully prays for an order vacating the attachment levied herein, dismissing the amended and supplemental libel as to the respondent Compania Colombiana Del Caribe, S. A., and for such other, further and different relief as to the Court may seem just and proper.

(S.) Charles E. Ramirez.

[fol. 102] Sworn to before me this 16th day of August, 1948. C. T. McCormick, Jr., Clerk of Court. (Seal.)

Filed August 16, 1948.

MINUTES OF AUGUST 30, 1948

[Title omitted]

This case coming on regularly for the hearing of the arguments of proctors on the libelant's motion for an order directing the sale of the ship "Caribe", and on the respondents motions for an order vacating the attachment heretofore made herein and dismissing the amended and supplemental libel heretofore filed herein, the libelant appears by one of its proctors of record W. J. Sheridan, Jr. Charles E. Ramirez, of Van Siclen & Ramirez, appears as proctor for the respondents Compania Transmaritima Colombiana, S. A. and Compania Colombiana Del Caribe, S. A.

Comes Charles E. Ramirez and introduces and presents to the Court Nicholas J. Healy, 3rd, of the firm of Nelson, Healy & Baillie 52 Broadway, New York 4, N. Y., and states to the Court that Mr. Healy is admitted to practice before the Courts of New York, and that he is at present in this jurisdiction to represent the above-named two respondents as associate proctor with the firm of Van Siclen and Ramirez, on the hearing of the above entitled motions and all proceedings herein. Upon such statement Mr. Ramirez moves the admission of Mr. Healy to appear in [fol. 103] this case as associate proctor, and upon such statement and motion the Court orders the admission of Mr. Healy as associate proctor with the firm of Van Siclen & Ramirez in this case.

Mr. Ramirez also orally enters the appearance of the firm of Nelson, Healy & Baillie as associate proctors in this case. The Court directs that the written appearance of said firm be prepared and filed herein.

And the Court having heard the oral arguments of proctors herein, the said motions are submitted to the Court upon the pleadings and oral arguments, and briefs, and are taken under consideration for decision.

[fol. 104] OPINION

[Title omitted]

This action in admiralty was filed March 7, 1948 upon a libel in personam accompanied by a prayer for foreign attachment.

The respondent Compania Transmaritima Colombiana was incorporated under the laws of the Republic of Colombia. As such incorporated company it was the registered owner of two vessels; namely, the Cali and the Alacran, which registration was likewise in the Republic of Colombia.

On the 7th day of January, 1948, the above corporation received from one Luis A. Noba at Guayaquil, Ecuador, a certain quantity of bagged rice. Luis A. Noba, a resident and citizen of Colombia, contracted with the carrier that such rice be transported and delivered under an "order bill of lading" to the ports of Cienfuegos, Cuba, and Santiago de Cuba with notation on such bills of lading to notify Swift & Company of Habana, Cuba, and Industrial Commercial Casal, at Santiago de Cuba.

[fol. 105] This rice was loaded on the vessel Cali and on the 17th day of January, 1948, the vessel Cali was beached on the island of Grand Cayman resulting in the loss of the rice before reaching the ports of delivery.

The libelant Swift & Company is a corporation organized under the laws of the State of Nevada in the United States which, by reason of the place of its incorporation, is the place of residence. The other libelants are residents and citizens of the Republic of Cuba other than Luis A. Noba who is a citizen and resident of the Republic of Colombia.

The pleadings allege the delivery by Luis A. Noba, of the rice to the carrier for delivery; however, there is no allegation in pleadings setting forth how or by what manner the ownership of this rice in question passed from Noba to Swift & Company or to the other named libelants. The only allegation stated as to such claimed ownership is that they (libelants) became the owner of all the merchandise so shipped.

Under the above proceedings, a process in personam with clause of foreign attachment was issued March 7, 1948, and by Marshal executing such process by serving Captain John Bowie, the Master of the vessel Caribe,

and by taking into the Marshal's custody the steamer Caribe, her engines et cetera, and "also some gear, hoists, winches, etc., from the M/V Cali, part of the goods and chattels of the respondents."

On the following day, March 8, 1948, an amended and supplemental libel was filed by the same libelants causing the corporation, Compania Colombiana Del Caribe to be made a party respondent and charging that the respondent Compania Colombiana Del Caribe was on March 4, 1948 organized under the laws of the Republic of Colombia, and [fol. 106] was organized by the directors, officers, and stockholders of the corpofation Compania Transmaritima Colombiana without any substantial monies being paid into its treasury, and that the corporation Compania Colombiana Del Caribe is merely the creature or alter ego of the corporation Compania Transmaritima Colombiana and that the transfer of the steamship Alacran to the corporation Compania Colombiana Del Caribe was not a real or valid consideration and was wholly fictitious and an attempt to defraud the rights of the libelants; that in furtherance of such fraudulent scheme that the name of such vessel was changed from Alacran to Caribe, which change was registered in the Custom and Port Officials of Barranquilla, Colombia on or about March 4, 1948.

This amended and supplemental libel by way of a plea in the alternative alleges that the corporation Compania Colombiana Del Caribe is indebted unto the corporation Compania Transmaritima Colombiana for the full purchase price of said steamship Alacran now known as the steamship Caribe or a substantial part thereof.

Process with clause of foreign attachment was issued under the prayer contained in the amended and supplemental libel on March 8, 1948, which was executed on March 8, 1948 on Captain John Bowie as Master of the vessel Caribe and by taking into official custody the vessel Caribe, her engines, et cetera.

The respondents, Compania Transmaritima Colombiana and Compania Colombiana Del Caribe, filed their answers on June 11, 1948, denying all allegations contained in amended and substituted libel and in support of such denial have filed affidavits.

[fol. 107] On August 16, 1948, the respondent Compania Colombiana Del Caribe, upon notice, filed motion to vacate

and discharge attachment on steamship Caribe and for an order dismissing the amended and supplemental libel filed herein on March 8, 1948, there being attached to such motion an affidavit of one of the proctors for respondents.

This action is now before this Court on the above motion to vacate and discharge the attachment on the vessel Caribe and for an order dismissing the amended and supplemental libel filed March 8, 1948, upon the grounds of nonjurisdiction and failure of libel to allege facts sufficient to support libelants' cause of action.

The motion to discharge levy of attachment and to dismiss amended and supplemental libel, which is supported by affidavit, will be treated as a motion for summary judgment under rule 12b of the Federal Rules of Civil Procedure, 28 U. S. C. A., following section 723c as recently amended.

Finding of Facts

The liability of the respondent, Compania Transmaritima Colombiana, commenced upon its failure to deliver the shipment of rice to the ports of Santiago de Cuba and Cienfuegos, Cuba. Its vessel Cali which contained the shipment in question was beached on the Island of Grand Cayman on January 17, 1948, resulting in that such rice was never delivered at either of the two designated ports. After the beaching of the vessel Cali, and prior to the filing of this libel proceeding, and in the latter part of February, 1948, certain individual citizens and residents of the Republic of Colombia organized and created under the laws [fol. 108] of the Republic of Colombia a corporation designated as "Compania Colombiana Del Caribe."

Some, but not all, of the stockholders of the corporation Compania Transmaritime Colombiana were stockholders in the corporation, Compania Colombiana Del Caribe, and likewise the designated managing officers of the two corporations were different persons, other than Walter Keene acting as Chairman of the Board of Directors of both incorporated companies.

Prior to February, 1948, the date of the creation of the corporation Compania Colombiana Del Caribe, the corporation Compania Transmaritima was the registered owner under the laws of the Republic of Colombia of a vessel named Alacran.

After the incorporation of Compania Colombiana Del Caribe and on February 25, 1948, the vessel Alacran was

sold and transferred from the corporation Compania Transmaritima Colombiana to the corporation Compania Colombiana Del Caribe. Thereafter and on March 4, 1948, the vessel Ahaeran was changed to the name of Caribe and under that name was registered in the office of administration of customs of Barranquilla and in the Republic of Colombia under the ownership of Compania Colombiana Del Caribe. An attested copy of certificate of registry has been filed as an exhibit herein.

The vessel Caribe from and after date of registration and up to the time of levy under the attachment proceedings of March 8, 1948, had been operated by the corporation Compania Del Caribe.

Libelants' claims are a direct obligation of the corporation Compania Transmaritima Colombiana and in view of the corporation Compania Colombiana Del Caribe not being [fol. 109] in existence prior to February, 1948, and of its not being in existence until more than thirty days after the beaching of the vessel Cali, there cannot be any liability existing against the Compania Colombiana Del Caribe unless a right of action based upon one of two facts exists, the first of which is, if the one corporation is merely a fictitious entity for the other or if either are alter ego for the other, then upon such fact being established, any assets of either could be reached by libelants in satisfaction of their claims, and the other right of action would be if the corporation Del Caribe had in its custody or control any property or assets belonging to the corporation Transmaritima Colombiana, then such property or assets could be sequestered to the payment of libelants' claims.

There is no charge contained in libelants' complaint which charges any contractual or maritime liability against the corporation Del Caribe, libelants' claim against this corporation being founded entirely on the relations existing between the two corporations from and after the breach of carriage committed by the corporation Compania Transmaritima Colombiana.

Respondents' motion to dismiss levy or attachment on the vessel Caribe is based upon two questions of law:

First, that this Court lacks jurisdiction to inquire into or determine any relations existing or transactions carried out between the two corporations in view of the fact that same were completed in and under the laws of the Republic

of Colombia and therefore the determinative authority over such acts and transactions are governed solely by the laws of the Republic of Colombia.

[fol. 110] Second, that the cause of action, out of which the attachment of the vessel Caribe was issued, fails to allege any fact or cause constituting an act of transportation of commerce by sea and therefore such action against the corporation Del Caribe is not of a maritime nature and does not come within the jurisdiction of an admiralty Court.

It is a well recognized rule which limits the jurisdiction of admiralty Courts to maritime subjects, and maritime subjects are those which pertain to transportation by sea or those which relate to navigation, maritime employment, or commerce on navigable waters.

If this controversy concerned only the liability or non-liability of the respondent Transmaritima Colombiana for the loss of the rice referred to and as set forth in the original libel, there would be no question as to the admiralty nature of such controversy.

However, the amended and supplemental libel includes another corporation, the Del Caribe, as a respondent, without any charge or allegation connecting the corporation Del Caribe with any contract or act pertaining to the shipment or loss of the rice referred to. The only charge made against the corporation Del Caribe is to the effect that the corporation Del Caribe was organized after the time of the loss of the rice and for the purpose of carrying out a fictitious plan to defraud libelants and to avoid the solvency and enforcement of their claims against the corporation Transmaritima Colombiana.

The above charge is the only cause of action alleged against the corporation Del Caribe and therefore the only issue pending under such charge which presents the ques-[fol. 111] tion as to whether any of such alleged acts if inquired into would develop any fraudulent or fictitious plan, and if so, what power or jurisdictional authority would a Court of admiralty have to engage in such inquiry under the equitable rules of admiralty.

So as to determine the Court's jurisdiction, there must be ascertained whether the claim asserted concerns the transportation, navigation, maritime employment, or commerce or navigable waters.

If a claim does not arise under one or more of the above subjects, then such claim lacks the qualities of being maritime, and a Court of admiralty is without jurisdiction.

There cannot be any question but that under the contract of shipment as between libelant and respondent Compania Transmaritima Colombiana there exists maritime qualifications, and this Court as a Court of Admiralty has jurisdiction.

A different question in reference to jurisdiction is present under the allegations charged in the libel against the Compania Del Caribe.

It goes without saying that under the amended and supplemental libel no subject of maritime qualification is alleged. The only relief sought is of an equitable nature, that is for the Court to purge the alleged fraudulent acts.

Any equities which may exist in favor of libelants and against the corporation Del Caribe should not be undertaken or inquired into by this Court as a Court of admiralty. If any facts are available confirming the charges of fraud, as contained in the amended and supplemental libel, then such development and result should be undertaken in the Courts of the Republic of Colombia, and in no event would this Court as a Court of admiralty have jurisdiction.

[fol. 112] The fact that this Court does have admiralty jurisdiction as against the respondent Compania Transmaritima Colombiana does not vest in this Court the power of extending such jurisdiction by including other subjects and of a non-maritime nature with those of a maritime nature. If any event, this Court as an admiralty Court has the right to refuse the assumption of such non-maritime jurisdiction and under such rule this Court does refuse to maintain jurisdiction and to pass upon or inquire into any alleged scheme or device which may exist or may have been entered into between the two respective respondents in the Republic of Colombia.

Under this ruling it must be held that the vessel Caribe levied on under the attachment issued on the amended and supplemental complaint was at the time of such levy the property of the incorporated respondent Compania Colombiana Del Caribe, and by reason thereof the levy of attachment on the vessel Caribe is hereby discharged and such vessel released therefrom. However, the respondent, Com-

pania Colombiana Del Caribe, was likewise proceeded against in the complaint as being indebted and having in its possession and under its control certain funds and personal property of the respondent Compania Transmaritima Colombiana. The Marshal's return shows that there was levied on as the property of the Transmaritima Colombiana corporation "some gear, hoists, winches, etc., from the M. V. Cali." Therefore the only response which the respondent Compania Colombiana Del Caribe will be compelled to make is that of garnishee and as such to disclose any and all funds, indebtedness, money, or property of which it is as such garnishee owes or has in its possession belonging to the respondent Compania Transmaritima Colombiana.

[fol. 113] Proctors for respondents will prepare an order discharging levy of attachment on the vessel Caribe with such other proper orders conforming to the opinion of this Court.

The Court in its conclusions of facts and law has adopted the decisions expressing the laws which are applicable to the facts on this case and in applying those announcements to the ruling of this Court hereby recognize the following decisions as being the law of this case:

The "Ada" 250 Federal 194.

Yone Suzuki vs. Central Argentine 19 Fed. (2) 645, 27 Fed. (2) 795—806.

Kingston Dry Dock Co. vs. Lake Champlain Transp. Co., 31 Fed. (2) 265.

Sept. 20, 1948.

(Sgd.) Joseph J. Hancock, Judge.

[Filed September 20, 1948.]

[fol. 114] MOTION

[Title omitted]

Come now the libelants in the within case and by one of their proctors of record, W. J. Sheridan, Jr., moves this Honorable Court for a rehearing on the motions argued and

heard before this Court on August 30, 1948, on the grounds that the ruling of this Court, filed September 20, 1948, contains errors of law and fact prejudicial to the said libelants in the following respects.

1. The Court erred in treating the motion as "a motion for summary judgment under Rule 12-B of the Federal Rules of Civil Procedure."

[fol. 115] 2. The Court erred in failing to treat the motion solely as governed by the admiralty rules of the Supreme Court, and the admiralty rules of this Court.

3. The Court erred in failing to hold that the question of admiralty jurisdiction was not *not* properly raised by the motion.

4. The Court erred in considering matters set forth in a so called affidavit which on its face shows that all of the matters sought to be stated therein would be excluded under the hearsay rule.

5. The Court erred in determining a controverted issue of fact on a motion which could at best be but an exceptive plea under admiralty rules and procedure.

6. The Court erred in failing to hold that the libel and amended and supplemental libel state a cause of action within the admiralty and maritime jurisdiction and that the question of ownership of the vessel attached is purely incidental and therefore receives a maritime character instead of remaining separable.

7. The Court erred in holding that an Admiralty Court may not prevent a party from taking advantage of his own fraud and may not look through the simulated sale of a vessel.

8. The Court erred in not holding that libelants' pleadings alleged that Compania Transmaritima Colombia S. A. was the owner of the attached vessel and that the pretended sale to Compania Colombiana Del Caribe, S. A., was only [fol. 116] a simulation designed to defraud libelants of their rights and that such an issue could only be resolved by competent proof on the trial of the cause.

9. The Court erred in dismissing the libel as to Compania Del Caribe, S. A., and vacating the attachment of the Steamship Caribe.

s/s W. J. Sheridan, Jr., of proctors for libelants.

Dated: October 6, 1948.

[Filed October 6, 1948.]

NOTICE OF MOTION

[Title omitted]

To Mr. Charles E. Ramirez, Proctor for respondents:

Please take notice that the undersigned proctor for the libelants, Swift & Company Packers, et al., will, on Monday, October 11, 1948, at the hour of nine a. m. or so soon thereafter as counsel can be heard, move for a rehearing on the ruling of this Court sustaining the motion of respondents to vacate attachment and dismiss amended and supplemental libel.

(S.) W. J. Sheridan, Jr., of proctor for libelants.

Dated: October 6, 1948.

[Filed October 6, 1948.]

[fol. 117] ANSWER TO MOTION

[Title omitted]

The undersigned proctors for respondent Compania Colombiana del Caribe, S. A. answering the Motion of the libelants for a rehearing of the motion argued and heard before this Court on August 30, 1948 on the grounds that the ruling of this Court filed September 20, 1948, contained errors of law and fact prejudicial to said libelants, alleges:

1. Libelants motion shows no substantial reason why the rehearing should be granted and it is the practice that rehearings should be granted only in extraordinary cases. The motion does not show such extraordinary circumstances.

2. Referring to points 1 and 2 in libelants motion: Rule 23 of Admiralty Rules, United States District Court for the Canal Zone gives the Court the authority to release from arrest or attachment summarily, the property attached or arrested on an order to show cause. Certainly if the Court has such authority under an order to show cause it has such authority under a motion regularly made and noticed and therefore it is immaterial whether the procedure was based on the Admiralty Rules or under Civil Rules of the Courts

3. As to point 3 of the Motion: The question of jurisdiction may be raised at any time.

4. As to points 4 and 5: If third party's claim to an arrested vessel in a summary proceeding for its release is not [fol. 118] tryable on motion and affidavits the results might be to detain innocent party's vessel several years.

Upon the argument of this motion on August 30, 1948, respondent orally stated its willingness to offer oral proof but the libelants in open Court conceded the ownership of the "Caribe" in Compania Colombiana del Caribe. Libelants failed to file answering affidavits disputing all other facts.

5. As to points 6, 7, and 8: These points merely reiterate substantive arguments previously made.

It will be noted that the motion does not offer any new authority or reason to upset the previous ruling of this Court.

Respondent earnestly urges the Court that any further delay will be very costly to respondents who already have been prevented from having their vessel engaged in the business of the Corporation since March 1948 and for this reason the order submitted by respondent should be signed immediately.

Dated: October 9, 1948.

Van Siclen & Ramirez, (S.) By Charles E. Ramirez,
Of Proctors for Respondents.

Post Office address: Box 124, Ancon, Canal Zone.

(Filed October 11, 1948.)

6—230

[fol. 119] MINUTES OF OCTOBER 11, 1948

[Title omitted]

This case coming on regularly upon the respondents motion for an order dismissing the motion and notice of motion filed by the proctors for the libelants for a rehearing on September 24, 1948, and for the signing of the order in conformity with the Court's opinion as tendered by proctors for respondents, and upon the libelants motion and notice of motion filed herein on October 6, 1948, for rehearing of the ruling of the Court sustaining the motion of respondents to vacate attachment and dismiss amended and supplemental libel, and respondents answer to said motion, the libelants appear by proctor W. J. Sheridan, Jr., and the respondents appear by proctor Charles E. Ramirez.

Comes W. J. Sheridan, Jr. and introduces and presents to the Court Hary F. Stiles, of the firm of Deutsch, Kerrigan & Stiles, New Orleans, La., and states to the Court that Mr. Stiles is a member of the Supreme Court of Louisiana, admitted to practice therein, and is also admitted to practice before the U. S. Circuit Court of Appeals, Fifth Circuit, and the United States Supreme Court; that Mr. Stiles is at present in this jurisdiction to represent the above-named libelants with the firm of McGrath, Sheridan and Thomas. Upon such statement Mr. Sheridan moves the admission of Mr. Stiles to appear as proctor in this Court in the above-entitled case, and upon such statement and motion the Court orders the admission of Mr. Stiles in accordance with said motion.

And the Court having heard the statements and argu- [fol. 120] ments on the libelants motion for a rehearing filed herein on September 24, 1948, and upon respondents motion to dismiss said motion, and the Court being advised, overrules and dismisses the libelant's motion as filed herein on Sept. 24, 1948.

And the Court having heard the statements and arguments of proctors for the responsive parties on the libelants motion filed herein on October 6, 1948, for a rehearing of the ruling on the Court sustaining the motion of respondents to vacate attachment and dismiss amended and supplemental libel, and respondents answer to said motion, the said motion is taken under consideration by the Court.

Proctors for the respondents are to prepare and submit a brief, and proctors for the libelants are to prepare and submit a brief within five days after receiving a copy of respondents brief.

The Court defers the signing of the order in accordance with its opinion as tendered by proctors for respondents.

AFFIDAVIT

[Title omitted]

I, W. J. Sheridan, Jr., hereby affirm and declare that I did not admit that the ownership of the Steamship Caribe was in Compania Colombiana del Caribe, S. A.

(S.) W. J. Sheridan, Jr.

[fol. 121] Sworn to and subscribed before me this 27th day of October, 1948. (S.) C. T. McCormick, Jr., Clerk of Court. (Seal)

(Filed October 27, 1948.)

(Respondent's objection noted to foregoing affidavit.)

(See last paragraph of respondent's praecipe.)

INTERROGATORIES PROPOUNDED BY LIBELANTS TO GARNISHEE JOHNSON & HIGGINS PURSUANT TO ADMIRALTY RULE 36 TO BE ANSWERED IN WRITING UNDER OATH:

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

SWIFT & COMPANY PACKERS, et al., Libelants

against

COMPANIA TRANSMARITIMA COLUMBIANA, S. A., Respondent

1. Is it not a fact that you have in your hands or under your control money belonging to Compania Transmaritima Columbiana, S. A.

2. If your answer is yes, state how much money you have.

[fol. 122] 3. Is it not a fact that you have in your hands the insurance proceeds of the vessel M/V Cali, belonging to Compania Transmaritima Columbiana, S. A.

4. If you answer to interrogatory 3 is yes, state how much you have.

5. If you answer to interrogatory 3 is no, please state,

(a) whether you ever had such proceeds

(b) If you ever had such proceeds, the name and address of the person or corporation or bank to which you paid them and on what date.

(c) whether you expect to receive such proceeds.

Hill, Rivkins & Middleton, Proctors for Libelants.
Office & P. O. Address, No. 96 Fulton Street, Borough of Manhattan, New York 7, N. Y.

ANSWER OF JOHNSON AND HIGGINS, GARNISHEE, TO INTERROGATORIES

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

A. 156-24

SWIFT & COMPANY PACKERS, et al., Libelants

against

COMPANIA TRANSMARITIMA COLOMBIANA, S. A., Respondent

[fol. 123] The answer of Johnson and Higgins, as Garnishee, to the interrogatories addressed to said Garnishee alleges as follows:

Garnishee, Johnson and Higgins, answers No to interrogatories 1, 3, and 5 (a) (c).

Wherefore, this Garnishee prays that it may be hence dismissed, and that costs and expenses may be decreed to it.

Kirlin, Campbell, Hickox & Keating, Proctors for Johnson and Higgins, as Garnishee, Office & P. O. Address, 120 Broadway, Borough of Manhattan, New York 5, New York.

STATE OF NEW YORK,
County of New York; ss:

C. R. Nash, being duly sworn says:

That he is Treasurer of Johnson and Higgins, the Garnishee named in the foregoing answer; that the said answer or return is true to the best of his knowledge, information and belief.

C. R. Nash.

[fol. 124] Sworn to before me this 7th day of May, 1948. Thomas L. Martin, Notary Public. State of New York. Residing in Nassau County. (Seal.)

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT, NEW YORK

A. 156-24

SWIFT & COMPANY PACKERS, et al., Libelants

against

COMPANIA TRANSMARITIMA COLOMBIANA, S. A., Respondent

SIRS.

Please Take Notice that upon the libel herein, the interrogatories propounded by the libelants to Johnson & Higgins, garnishee herein, the answer of Johnson & Higgins, to the libelants' interrogatories, verified May 7, 1948, and the annexed affidavit of Barton P. Ferris, sworn to May 3, 1948, the undersigned will move this Court at a stated term for the hearing of motions, to be held in Room 506, United States Court House, Foley Square, City and State of New York, on the 18th day of May, 1948, at 10:30 A. M. in that day, or as soon thereafter as counsel can be heard, for an order directing the said garnishee by J. P. Nelson, Manager, Adjusting Department, or any officer, director or employee having knowledge of the facts, to appear and to be examined orally under oath as to the hull insurance of the M/V Cali and the proceeds thereof, at time and place to be fixed in the order, and directing the said garnishee to produce at the said examination all its books, papers, correspondence, policies or copies of

[fol. 125] policies, memoranda and documents relating to the hull insurance of the M/V Cali and the proceeds thereof in its possession and control, and for such other, further and different relief as may be just and proper.

Dated, New York, May 13, 1948.

Yours, etc., Hill, Rivkins & Middleton, Proctors for Libelants, Office & P. O. Address, No. 96 Fulton Street, Borough of Manhattan, City of New York.

To: Kirklin, Campbell, Hickox & Keating, Esqs., Proctors for Johnson & Higgins, Garnishee, 120 Broadway, Borough of Manhattan, New York 5, N. Y.

[fol. 126] ORDER

Motion is granted to extent of authorizing service of additional written interrogatories.

May 21, 1948.

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT NEW YORK

A. 156-24

SWIFT & COMPANY PACKERS, et al., Libelants

against

COMPANIA TRANSMARITIMA COLOMBIANA, S. A., Respondent

STATE OF NEW YORK,
County of New York, ss:

Barton P. Ferris, being duly sworn, deposes and says:

I am an attorney associated with the firm of Hill, Rivkins & Middleton, proctors for the libelants, and am familiar with the proceedings heretofore had in this action.

The libel herein demands $380,000.00 for cargo loss and damage, and was filed on April 29, 1948 against respondent which is alleged to have been the owner and operator of the M/V Cali which carried the cargo in question. The libel also alleges that Johnson & Higgins, insurance bro-

kers, hold the insurance proceeds of the hull of the M/V Cali in the sum of $140,000.00 or thereabouts and asks that such proceeds be attached by process of foreign attachment. The respondent is a corporation of the Republic of Colombia and has no office or officers within the State of [fol. 127] New York. Upon information and belief, the M/V Cali is now a constructive total loss in the vicinity of the Cayman Islands.

On April 29, 1948 a writ of foreign attachment was issued and served by the Marshal the same day upon Johnson & Higgins, garnishee, to attach the insurance proceeds of the M/V Cali.

On April 29, 1948 there were served upon the garnishee, written interrogatories propounded by the libelants, pursuant to Admiralty Rule 36.

The garnishee has filed its answer to the interrogatories propounded by the libelants stating that it has no money belonging to the respondent, that it does not have the proceeds of the insurance of the M/V Cali belonging to respondent, has never had them and does not expect to receive them. There has thus been created an issue as between the libelants and the garnishee which must be tried by this Court.

The cargo underwriters have informed deponent that as a result of their inquiries and researches, it is their opinion that the hull insurance of the M/V Cali was placed by Johnson & Higgins, the garnishee herein, as broker, in the London market through Willis, Fabre & Co., London insurance brokers, that in the normal course Johnson & Higgins would receive the proceeds of the hull insurance for transmission to their client, and that the normal course in this case would have been on or about April 29, 1948. It is reported to deponent that in January, 1948 the M/V Cali sustained a casualty in the vicinity of the Cayman Islands as the result of which she became a constructive total loss, that hull underwriters have accepted her abandonment becoming liable for insurance in [fol. 128] the sum of $140,000.00, and have sold the wreck for $2,000.00.

Deponent accompanied the Marshal when the writ of foreign attachment was served on April 29, 1948, and on that occasion spoke with Henry Bernard, a director of Johnson & Higgins, the garnishee herein. In deponent's

presence Mr. Bernard phoned an employee of the garnishee, and informed deponent that said employee "knew about it" by which deponent understood that said employee knew about the insurance of the M/V Cali and its proceeds.

The answer of the garnishee to the libelants' interrogatories does not show all the facts relating to the insurance of the M/V Cali and its proceeds which are apparently within the knowledge of the garnishee, and an oral examination of said garnishee is necessary in order to ascertain whether said insurance proceeds are now or ever have been under the control or in the possession of the garnishee.

Furthermore, through such an oral examination libelants should be able to trace the proceeds of such insurance and *and* thus may be able to discover attachable assets within the jurisdiction of this Court.

Wherefore, deponent prays that the order specified in the annexed notice of motion be granted.

Sworn to before me this 13th day of May, 1948.

[fol. 129] INTERROGATORIES PROPOUNDED BY LIBELANTS TO JOHNSON & HIGGINS, GARNISHEE, PURSUANT TO ORDER DATED MAY 21, 1948, TO BE ANSWERED IN WRITING AND UNDER OATH (AND) ANSWER OF JOHNSON & HIGGINS, GARNISHEE, TO LIBELANT'S ADDITIONAL INTERROGATORIES, PURSUANT TO ORDER DATED MAY 21ST, 1948

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

A. 156-24

SWIFT & COMPANY, PACKERS, et. al., Libelants,

against

COMPANIA TRANSMARITIMA COLOMBIANA, S. A., Respondent

1. Is it not a fact that you are and have been for many years engaged in the insurance brokerage business, including marine insurance?

Yes.

2. Is it not a fact that Willis, Fabre & Dumas, insurance brokers of London, England, act for and or in conjunction with you in placing marine insurance risks in the English market?

Yes. But the correct name is Willis Faber & Dumas.

3. Is it not a fact that you acted as broker, either directly or through or in conjunction with Willis, Fabre & Dumas in effecting or placing a policy of marine insurance on the hull of a certain vessel known as the Cali or Hidalgo or [fol. 130] Ethel M. Sterling or Hawaii (This being the same vessel, the latest supplement of Lloyd's Register lists her name as the Cali but shows that she was formerly named Hidalgo, Ethel M. Sterling or Hawaii at various times) which policy was in effect in January or February, 1948?

Yes.

4. If your answer to Interrogatory #3 is in the affirmative, please state

(a) When, where and with what insurer or insurers said policy was written or effected;

(Answer) On information and belief, with English underwriters, but the names of said underwriters are unknown to this garnishee.

(b) The amount of said policy, that is to say, the amount payable under the terms thereof in the event of a total or constructive total loss;

(Answer) On information and belief, $175,000.

(c) The name or names of the assured or assureds in said policy?

(Answer) On information and belief, Willis Faber & Dumas "for whom it may concern."

(d) If Willis, Fabre & Dumas were named as the assured in said policy, state the name or names of the real parties at interest and by that is meant the party or parties to whom the insurance monies were ultimately payable;

(Answer) W. W. Keene.

[fol. 131] (e) The country, city and street address in and at which a loss under said policy is or was payable;

(Answer) On information and belief, in London, England.

(f) In the currency of what country any loss under said policy is or was payable;

(Answer) On information and belief, in currency of the United States.

(g) Out of what fund or funds any loss under said policy is or was payable and the name or names and address and addresses of the person or persons, firm or firms partnership or partnerships, corporation or corporations who have the custody and or control and/or physical possession of said fund or funds.

(Answer) Unknown to this garnishee.

5. Is it not a fact that claim was made under said policy based on the total loss and/or constructive total loss of and or other loss to said vessel at or in the vicinity of Grand Cayman during January and/or February, 1948?

(Answer) Yes.

6. If you answer interrogatory #5 in the affirmative, state, in detail, whether the insurer or insurers paid the loss or authorized the payment of the loss, when; how and to whom the loss was paid and the amount, date and place of said payment.

(Answer) (Answering Interrogatories 6, 7 and 8) On information and belief, the insurance, in the net amount of $172,500, was paid by the English underwriters to Willis [fol. 132] Faber & Dumas, and the latter remitted a net amount of $170,775 in accordance with the instructions of W. W. Keene through the U. S. National Bank, Galveston, Texas. The exact dates of the said payments are unknown to this garnishee.

7. State whether or not the insurer or insurers paid or authorized the payment of said loss to Willis, Fabre & Dumas.

(Answer) (Answering Interrogatories 6, 7 and 8) On information and belief, the insurance, in the net amount of $172,500, was paid by the English underwriters to Willis Faber & Dumas, and the latter remitted a net amount of $170,775 in accordance with the instructions of W. W. Keene through the U. S. National Bank, Galveston, Texas. The exact dates of the said payments are unknown to this garnishee.

8. If you answer Interrogatory #7 in the affirmative, state what payments were made or authorized and or in-

structions for payment issued by Willis, Fabre & Dumas, when, how and to whom, and the amount, date and place of said payments or authorizations for payment.

(Answer) (Answering Interrogatories 6, 7 and 8) On information and belief, the insurance, in the net amount of $172,500, was paid by the English underwriters to Willis Faber & Dumas, and the latter remitted a net amount of $170,775 in accordance with the instructions of W. W. Keene through the U. S. National Bank, Galveston, Texas. The exact dates of the said payments are unknown to this garnishee.

[fol. 133] 9. What, if any, connection past or present did you or do you have with the proceeds of said policy?

(Answer) None.

10. Has payment of any monies derived from said policy been made to any one other than Willis, Fabre & Dumas?

(a) If so, state to whom, when where any by whom, and the amount or amounts of said payment or payments.

(Answer) Unknown to this garnishee, except as stated in the preceding answers.

11. Where are the proceeds of said policy at present?

(Answer) Unknown to this garnishee.

12. State in detail whatever information you have relating to, bearing upon, or in any way connected with, either directly or indirectly, the following matters:

(a) The placing or effecting of insurance on the hull of said vessel;

(Answer) Answered in the preceding answers.

(b) The names of the insurer or insurers, the assured or assureds and the amount or amounts stated in said policy?

(Answer) Answered in the preceding answers.

(c) The proofs of loss which were submitted in connection with or resulting from the total or constructive total loss of said vessel in January and or February, 1948, at or in the vicinity of Grand Cayman;

[fol. 134] (Answer) Protests executed by the personnel of the Cali and affidavit by W. W. Keene as to amount of insurance.

(d) The action taken by the insurer or insurers or any one else connected with or having custody or control of insurance monies payable under said policy, toward the payment of said loss under said policy.

(Answer) Unknown to this garnishee.

Hill, Rivkins & Middleton, Proctors for Libelants. Office & P. O. Address, No. 96 Fulton Street, Borough of Manhattan, New York 7, New York.

Kirlin, Campbell, Hifkox & Keating, Proctors for Johnson & Higgins, Garnishee. Office & P. O. Address, 120 Broadway, New York 5, N. Y.

(Respondent's objection noted to all the interrogatories and the answers thereto of Johnson & Higgins, garnishee. See last paragraph of respondent's praecipe.)

ORDER RE FURTHER ANSWER TO INTERROGATORY No. 6

At a Stated Term of the United States District Court, held in and for the Southern District of New York, at [fol. 135] the Federal Court House, Foley Square, Borough of Manhattan, New York City, on the 15 day of September, 1948.

Present: Hon. Simon H. Rifkind, United States District Judge.

SWIFT & COMPANY PACKERS, et al., Libellants,

A 156-24

against

COMPANIA TRANSMARITIMA COLOMBIANA, S. A., Respondent

The libelants having moved this Court on the 9th day of September, 1948 for an order requiring the garnishee, Johnson & Higgins, to further answer libelant's interrogatory No. 6 to said garnishee propounded in accordance with the order of this Court dated May 21, 1948, and Hill, Rivkins & Middleton, proctors for the libelants (Barton P. Ferris, Advocate) having appeared in support of said motion, and Kirlin, Campbell, Hickox & Keating, Esq., proctors for the garnishee, Johnson & Higgins (John F. Gerity, Advocate) having appeared in opposition to said motion, and due deliberation having been had

Now, upon reading and filing the notice of motion herein served September 1, 1948 and the affidavit of Eugene P. McCue sworn to the 31st day of August, 1948 in support of said motion and the affidavit of Robert E. Erskine sworn to September 3, 1948 in opposition to said motion, it is

Ordered that the garnishee, Johnson & Higgins, further answer libelants' interrogatory No. 6 to it by stating under oath the name of the person, partnership or corporation to whom the insurance proceeds of the M. V. Cali were paid in accordance with instructions of W. W. Keene through the United States National Bank, Galveston, Texas, and it is further

[fol. 136] Ordered that such further answer of the garnishee to libelants' interrogatory No. 6 be served and filed within 10 days of the date of the service of a copy of this order with notice of entry upon the proctors for the garnishee, Johnson & Higgins.

(S.) Simon H. Rifkind, U. S. D. J.

Answer of Johnson & Higgins, Garnishee, to Libelants' Additional Interrogatory Pursuant to Order Herein Dated September 15, 1948.

United States District Court, Southern District New York

Swift & Company Packers, et al., Libelants

A 156-24

against

Compania Transmaritima Colombiana, S. A., Respondent

Johnson & Higgins, garnishee, answering the additional interrogatory propounded to it by the libelants, pursuant to the order dated September 15, 1948, alleges as follows:

On information and belief, Willis Faber & Dumas, Ltd., acting in accordance with the request of W. W. Keene, remitted the insurance money to a bank in New York City, with instructions to pay the same to the United States National Bank, Galveston, Texas, for account of Cia Naviera Internacional, S. A.

[fol. 137] Wherefore, this garnishee prays that it may be hence dismissed, and the costs and expenses may be decreed to it:

Kirlin, Campbell, Hickox & Keating, Proctors for Johnson & Higgins, Garnishee. Office & P. O. Address, 120 Broadway, Borough of Manhattan, New York 5, New York.

STATE OF NEW YORK,
County of New York, ss:

C. R. Nash, being duly sworn, says:

I am Treasurer of Johnson & Higgins, the garnishee herein.

The foregoing answer by the said garnishee to libelants' interrogatory is true of my own knowledge, except the statements set forth therein upon information and belief, and I believe those said statements to be true.

(S.) C. R. Nash.

Sworn to before me this 23rd day of September, 1948.

(S.) Thomas L. Martin, Notary Public. (Seal)

[fol. 138] ORDER

IN THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF TEXAS, GALVESTON DIVISION

In Admiralty No. 1877

SWIFT & COMPANY, et al.,

vs.

WALTER W. KEENE, et al.

A motion having been made herein by libelants for oral examination of the garnishee, The United States National Bank of Galveston, and the Court having considered said motion, the affidavit in support thereof, and the interrogatories propounded by libelants, and the answers thereto by the garnishee, and it appearing that oral examination of said garnishee is necessary, it is

Ordered that A. J. Peterson, President of The United States National Bank of Galveston, or any officer, director, or employee having knowledge of the facts, appear before a Notary Public for oral examination under oath on Sep-

tember 27th at 2:00 P. M., at the offices of The United States National Bank of Galveston, Galveston, Texas, as to the deposit with The United States National Bank of Galveston of the proceeds of the hull insurance of the M/V Cali, and to produce at said examination all of its correspondence, memoranda, and documents of any kind or character relating to the deposit with the garnishee of the sum of One Hundred Seventy Thousand, Seven Hundred Seventy Five And No/100 ($170,775.00) Dollars, or thereabouts, by Messrs. Willis, Faber & Dumas, Insurance Brokers of London, England, in accordance with the instructions of Respondent W. W. Keene.

[fol. 139] Entered at Houston, Texas, September —, 1948.

——— ———, Judge.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF TEXAS, GALVESTON DIVISION

In Admiralty No. 1877

SWIFT & COMPANY et al.,

vs.

WALTER W. KEENE et al.

APPEARANCES:

Mr. Harry F. Stiles of Messrs. Deutsch, Kerrigan & Stiles, New Orleans, La., and Mr. M. L. Cook of Messrs. Royston & Rayzor, Galveston, Texas, for Libelants;

Mr. V. W. McLeod of Messrs. Wigley, McLeod, Mills & Shirley, Galveston, Texas, for Garnishee, U. S. National Bank of Galveston.

Answers and deposition of A. J. Peterson, of Galveston, Galveston County, Texas, in the above styled and numbered cause, taken at the instance of Libelants before Mary E. McGowan, a notary public in and for Galveston County, Texas, at 2:00 P. M. on the 27th day of September, A. D. 1948, in the offices of The United States National Bank of Galveston, Galveston, Galveston County, Texas, in response to oral interrogatories propounded to him in said cause by virtue of attached Order.

[fol. 140] A. J. Peterson, having first been duly sworn, testified as follows:

Direct examination.

By Mr. Harry F. Stiles:

Q. Will you give us your name?

A. A. J. Peterson.

Q. What is your occupation, Mr. Peterson?

A. President of The United States National Bank.

Q. You have occupied that position for how long?

A. Since February 1 of this year.

Q. Do you know Mr. Walter W. Keene?

A. Yes, sir.

Q. How long have you known Mr. Keene?

A. Oh, directly, I would say a couple of years; indirectly, for many years.

Q. Has Mr. Keene maintained an account in your bank since you have known him?

A. No, sir.

Q. Has he at any time maintained an account in your bank?

A. Not that I know of.

Q. Do you know Mr. Keene's occupation?

A. I know it by hearsay. He says he is a ship owner and operator.

Q. Has your bank ever entered into any financial transactions with Mr. Keene either individually or as an officer of a corporation?

A. Yes.

Q. Generally speaking, what was the nature of those transactions?

[fol. 141] Mr. McLeod: I am going to object to any question being asked other than specified in this Order. As I understand the Order, we are directed to appear and answer questions with reference to $170,775.00 or thereabouts, which allegedly was deposited by Messrs. Willis, Faber & Dumas, Insurance Brokers of London, England. Since the Order is limited to that, as I construe it, I am going to object to any questions relating to any transaction other than that as not being within the confines of the Order under which these interrogatories are being propounded.

Mr. Stiles: Well, the purpose of this proceeding is a suit against Mr. Keene individually and as either the sole owner or practical owner of certain corporations named in the complaint. The Marshal's return shows that he was unable to serve Mr. Keene and thereupon The United States National Bank was served as garnishee, the nature of these proceedings being to determine what, if any, funds, chattels, credits, goods, and effects the garnishee held for Mr. Keene either as an individual or operation under corporate names. The purpose of my questioning is to learn the background, the relations, between Mr. Keene and the Bank in order to determine how this particular deposit was made. Do I understand that Counsel's objection goes so far as to instruct the witness not to answer the question?

Mr. McLeod: I suggest this. Of course, this is your examination and not mine, but in view of the wording of this [fol. 142] Order don't you think that it would be proper to ask the witness whether The U. S. National Bank has ever received $170,775.00 from Messrs. Willis, Faber & Dumas?

Mr. Stiles: I would be glad to put the question that way.

Q. Mr. Peterson, will you tell us whether or not The United States National Bank of Galveston has ever received $170,775.00 or thereabouts from Willis, Faber & Dumas of London?

A. This is the first time I have heard the name Willis, Faber & Dumas. I have not received any money from them.

Q. It has been answered under oath in similar proceedings in the District Court of the United States for the Southern District of New York that Willis, Faber & Dumas, a brokerage concern of London, remitted $170,775.00, representing the hull insurance proceeds of the M/V Cali to "a bank in New York City, with instructions to pay the same to The United States National Bank of Galveston, Texas, for the account of Cia. Naviera Internacional, S. A.," on instructions of Mr. W. W. Keene. I ask you whether or not your bank did receive $170,775.00 or thereabouts from a New York bank to be deposited to the order of Cia. Naviera Internacional, S. A., on instructions of Mr. W. W. Keene.

A. We received a telegram from The National City Bank of New York, which, decoded, reads as follows: "We credit your account $170,775.00 for account of Cia. Naviera

Internacional, S. A., by order of Lloyds Underwriters Insurance Companies."

[fol. 143] Q. What is the date of this telegram?

A. April 5.

Q. 1948?

A. That is right.

Q. The effect of that, I take it, is to place on deposit with your bank, for the account of Cia. Naviera Internacional, S. A., that sum of money.

A. Not necessarily to place on deposit. We received that amount of money for their account, subject to whatever they wanted to do with it.

Q. What was done with the money?

A. At the request of Mr. Keene, who has a signature for deposits on Cia. Naviera Internacional, S. A., by telephone, several days in advance of receipt of this money, we issued a New York check, rather two New York checks, I believe—I can't be positive now—to the order of Cia. Naviera Internacional, S. A., which checks were delivered to him. No, it was one check.

Q. Was that a cashier's check?

A. No, it was a draft drawn on one of our New York correspondents.

Q. Will you tell us which correspondent it was?

A. Let's see if I have it (referring to file). It was drawn on the Bank of New York.

Q. What was the date of this draft?

A. April 6.

Q. And the amount of same?

A. The same thing, $170,775.00.

Q. Has that draft been cashed?

A. It has.

Q. When was it cashed?

A. The date is not very clear on the back here, but the Bank of New York seems to have paid it on June 13.

[fol. 144] Q. Will you tell us what endorsement is on the back of that check?

A. Compania Naviera Internacional, by W. W. Keene.

Q. Is Keene designated as any officer?

A. No. He has authority to sign for the company as agent or under power of attorney. However, that is not on here. We have a power of attorney and know he has the right to endorse it.

Q. Do you have a power of attorney in your file?
A. Yes, sir.
Q. Would you permit me to see it?
A. It is downstairs. I can hunt for it. It is in Spanish. Can you read it?
Q. After a fashion.

Mr. Cook: Would you let us have a copy thereof to go with this testimony?

A. Yes, sir.

(Photostat of said power of attorney, marked "Exhibit A," is attached hereto.)

Mr. Stiles: Are you familiar with the organization of Cia. Naviera Internacional, S. A.?
A. No, other than the power of attorney that was furnished us by the officers of the company.
Q. Do you know offhand under the laws of what country they are organized?
A. I believe Costa Rica.
[fol. 145] Q. Costa Rica?
A. I am not sure about that. I think that is it.
Q. At the present time do you have any goods, chattels, funds or effects in the hands of the Bank for the account of Cia. Naviera Internacional, S. A., or W. W. Keene?
A. $100.00.
Q. $100.00. To whose account?
A. Cia. Naviera.
Q. When did that company open an account with you? Can you tell me that?
A. May 28, 1946 (referring to file).
Q. Was it an active account up until this occurrence?
A. Fairly. You mean by "active" depositing and drawing checks against it?
Q. Yes.
A. That is right.
Q. Is the Bank a creditor of that company?
A. No.
Q. Is the Bank or was the Bank interested at all in the steamship "Cali"?
A. No, sir.
Q. Had you ever loaned any money to Mr. Keene?
A. No, sir.

Q. Or Compania Transmaritima Colombiana, S. A.?

A. No.

Q. Or Compania Colombiana del Caribe, S. A.?

A. No.

Q. Does the endorsement on your draft on the Bank of New York indicate that the endorsee received cash or that the draft was deposited somewhere else?

A. The draft was deposited right here in this Bank. It was redeposited in this Bank.

[fol. 146] Q. The draft was redeposited here?

A. That is right. That draft was redeposited with us on June 10, together with other funds, and on that same date the full amount of his account, with the exception of the $100.00 which I previously mentioned, was withdrawn in favor of Mr. Keene, who thereupon purchased New York drafts again, this time to his own order, for the full amount of the withdrawal.

Q. And how many New York drafts, one or more than one?

A. Three at that time, two on the Bank of New York.

Q. Will you give me the dates and the amounts of those?

A. All dated June 10, one for $123,132.56, one for $100,000.00, and a draft on the Irving Trust Co. of New York for $136,450.00.

Q. Will you tell me what happened to those drafts?

A. Well, I can't tell you what happened to them; I can tell you they were paid and what the endorsements are.

Q. Please.

A. The one for 123,000-odd dollars shows the endorsement of Mr. Keene, apparently handled at the Bank of New York, I would guess, on June 15. The one for $100,000.00 was also handled directly by Mr. Keene in the Bank of New York on June 15. The one for 136,000-odd dollars, which looks like the same date, June 15, was handled in the Irving Trust.

Q. Do those endorsements show whether Mr. Keene received cash for those drafts or whether he redeposited them?

[fol. 147] A. The two in the Bank of New York have in little words "Collection Department" stamped on them, which doesn't mean anything to me. The one in the Irving Trust shows "Securities Clearance Department." That is all the information we have on those items. How he handled them or what he did with them, I don't know.

Q. So far as you know, then, that was the end of the funds?

A. That is the end of the funds as far as we are concerned. That is what you are trying to find out, where the funds are?

Q. Yes, sir. And what Mr. Keene may have done with the funds since that time you do not know?

A. I haven't the slightest idea.

Q. Do you know where Mr. Keene is now?

A. No, I don't. I think he is in New York. I don't know.

Q. Have you ever had any dealings with any of the other officials of Cia. Naviera Internacional?

A. No. By "dealings" you mean any business transactions?

Q. Yes.

A. No, nothing but the signatures of authorization that they have sent in to us.

Q. Do you personally know any of the other officers of that corporation?

A. No.

Q. Is Mr. Keene an officer of the corporation, or do you know, Mr. Peterson?

A. I don't know that. I don't believe he is. I think he merely has a power of attorney from the corporation. I wouldn't know without looking at those resolutions.

[fol. 148] Q. Was the Bank in possession of the power of attorney to which you have referred prior to 1948?

A. Prior to these transactions I know it was. Without having it before me I can't state the exact date.

Q. Had you conducted prior transactions on the basis of the same power of attorney?

A. Yes, a number of them.

Direct examination.

By Mr. M. L. Cook:

Q. Just one more question. As I understand this transaction, the original funds of $170,775.00 were never what you would call on deposit in this Bank; they were to your credit in New York, is that correct?

A. That is right. They were placed to our credit in New York for the account of or use of Cia. Naviera Internacional, S. A.

Q. And if I understand you correctly, Mr. Peterson, the credit was in The National City Bank, but when you paid out the funds you drew your draft on a different bank, is that right?

A. That is right.

Q. Had the funds been transferred from The National City Bank to your other bank?

A. We happened to have them in another bank. As a matter of fact, we have eight correspondent banks.

Q. That was for your own convenience?

A. For our own convenience entirely. The funds were in the Bank of New York and the Irving Trust.

Q. That is all.

[fol. 149] Mr. Stiles: I would like to have photostats of all drafts attached to your deposition.

(Photostats, marked as Exhibits B to F, inclusive, are attached hereto.)

(Signed) A. J. Peterson.

Sworn to and subscribed before me by A. J. Peterson this 28th day of September, A. D. 1948. (Signed) Mary E. McGowan, Notary Public in and for Galveston County, Texas. (Seal.)

THE STATE OF TEXAS,
County of Galveston:

I, Mary E. McGowan, a notary public in and for Galveston County, Texas, do hereby certify that the said witness A. J. Peterson was by me first cautioned and sworn to tell the truth, the whole truth and nothing but the truth; that he was then carefully examined; that the testimony which is hereinbefore given was by me, and by no other person, reduced to shorthand and later to typewriting, and was, after it had been so reduced to typewriting and read by the witness, signed and sworn to before me by the said witness A. J. Peterson on the 28th day of September, A. D. 1948.

I further certify that I am not a relative, employee, attorney or counsel of any of the parties to this suit, or a relative or employee of the attorneys connected with [fol. 150] this suit, and that I am not financially interested in said action.

Witness my hand and official seal in the City of Galveston, Galveston County, Texas, this 28th day of September, A. D. 1948.

(Signed) Mary E. McGowan, Notary Public in and for Galveston County, Texas. (Seal.)

"EXHIBIT A"

I, H. L. Conrad, Secretary of Cia. Naviera Internacional, S. A., a corporation, of San Jose, C. R. do hereby certify that I am keeper of the records and the minutes of the proceedings of the Board of Directors of said Company, and that on the 27th day of December 1947 there was held a meeting of the Board of Directors of said Company, which was duly called and held in accordance with the law, and the by-laws of the Company, and at which a quorum of the Directors was present; and at said meeting the following resolution was duly and unanimously adopted and has been entered upon the minutes of said meeting:

Resolved: That an account shall be maintained in the name of this Company with the United States National Bank of Galveston, under the rules and regulations as prescribed by said Bank from time to time, wherein may be deposited any of the funds of this Company, whether represented by cash, checks, notes or other evidences of [fol. 151] debt, and from which withdrawals are hereby authorized in the name of the Company by any one of the following:

Walter W. Keene, Walter W. Keene, Jr.

Endorsements for deposit may be by the written or stamped endorsement of the Company, without designation of the party making the endorsement; and this Company hereby guarantees all prior endorsements on all checks, drafts or other similar instruments that may be deposited by it with said Bank.

Be It Further Resolved, That the said The United States National Bank of Galveston is hereby authorized to honor any and all withdrawals of the Company's funds payable to the officer or agent signing or countersigning the same and whether presented for cash or for credit to the per-

sonal account of such officer or agent, and said Bank need make no inquiry concerning such items.

The authority herein conferred upon the officers, agents and employees herein named shall not be revoked or changed, insofar as may concern said Bank, unless and until written notice of such revocation or change signed by the President and Secretary of this Company shall have been delivered to said Bank by delivering same to its President or one of its Vice-Presidents or its Cashier at its banking office.

All things heretofore done by the officers and agents of this Company with respect to deposits and withdrawals from its account are hereby ratified as being the acts of and binding upon this Company.

These instructions and the authority and instructions given thereby shall pass and inure to any successor or to [fol. 152] the assigns of The United States National Bank of Galveston.

I further certify that the following persons are now the officers of this Company and they and their successors are authorized in the foregoing resolution to sign, as designated, and that the signatures next appearing are the true signatures of such present officers and persons.

(Sgd.) L. K. Cofer, President. (Sgd.) W. W. Keene, Jr., Gen. Manager. (Sgd.) H. L. Conrad, Secretary. (Sgd.) N. R. Patterson, Vocal.

In Witnes- Whereof, I have hereunto set my hand as Secretary of said Company, and have attached hereto the official seal of said corporation, this 30th day of December, 1947.

(Sgd.) H. L. Conrad, Secretary. (Seal.)

EXHIBIT B".

(1) Face of Check

United States National Bank Of Galveston 46-4
Galveston, Texas. June 10, 1948 No. 6594

Pay to the Order of W. W. Keene $136,450.00
[fol. 153] 136450 and 00 Cts (C. J. L.)
(Perforations: 6.15.48 1.68.M) (W. K. M.)
Irving Trust Co.
New York, N. Y.
A. J. Peterson, Cashier, Vice-President.

(2) Back of Check—W. W. Keene

Securities Clearance Dept.

(Perforations: 6.15.48 1.67.M) (June 15, 48 6231.)

"Exhibit C"

(1) Face of Check

United States National Bank of Galveston 46-4
Galveston, Texas. Jun. 10, 1948 No. 6597

Pay to the Order of W. W. Keene $100,000.00
100000 and 00 cts

(Perforations: Paid 6.15.48 1.1)

Bank of New York,
New York, N. Y.

A. J. Peterson, Cashier, Vice-President.

(2) Back of Check—W. W. Keene

Collection Department (Perforations: Paid 6.15.48 1.1)

[fol. 154] "Exhibit D"

(1) Face of Check

United States National Bank of Galveston 46-4
Galveston, Texas. June 10, 1948 No. 6598

Pay to the Order of W. W. Keene $123.132.56
123132 and 56cts

Bank of New York,
New York, N. Y.

(Perforations: Paid 6.15.48 1.1)

A. J. Peterson, Cashier, Vice-President.

(2) Back of Check—W. W. Keene

Collection Department (Perforations: Paid 6.15.48 1.1)

"Exhibit E"

(Telegram) New York, April 5, 1948.

United States National Bank,
Galveston, Texas.

We credit your account $170,775.00 for account Cia. Naviera International S. A. By order of Lloyds Underwriters and Insurance Companies.

The National City Bank of New York.

[fol. 155] "EXHIBIT F"

(1) Face of Check

United States National Bank of Galveston 1—1 210
Galveston, Texas Apr-6 1948 No. 41622
(Perforations: Paid 6.14.48)
Pay to the Order of Compania Naviera Internacional, S. A.
$170,775.00 170775 and 00 Cts
To Bank of New York
48 Wall Street, New York, N. Y.
(J. W. S.) A. J. Peterson, Cashier, Vice-President.

(2) Back of Check Compania Naviera Internacional, S. A.—W. W. Keene
(Perforations: Paid 6.14.48)

* * * * * * *

UNITED STATES OF AMERICA,
Southern District of Texas, ss:

I, Hal V. Watts, Clerk of the United States District Court in and for the Southern District of Texas, do hereby certify that the annexed and foregoing is a true and full copy of the original Deposition of A. J. Peterson filed Oct. 12, 1948 in cause No. 1877 in the Admiralty docket of said Court entitled:

[fol. 156] SWIFT & COMPANY ET AL,

VS.

WALTER W. KEENE ET AL.

now remaining among the records of the said Court in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Galveston this 12th day of October, A. D. 1948.

Hal V. Watts, Clerk. (Sgd.) By K. S. Evans, Deputy Clerk. (Seal.)

(Respondent's objection noted to foregoing deposition See last paragraph of respondent's praecipe.)

[fol. 157] UNITED STATES DISTRICT COURT, FOR THE DISTRICT OF THE CANAL ZONE, BALBOA DIVISION

No. 2798 In Admiralty

SWIFT & COMPANY, PACKERS, ET AL.

vs.

COMPANIA TRANSMARITIMA COLOMBIANA, S. A. and COMPANIA COLOMBIANA DEL CARIBE, S. A.

This action is now before this Court on motion of libelants for a rehearing upon the Court's findings filed herein on September 20, 1948, libelants claiming that such findings contain errors of law and such claimed errors are itemized by nine separate paragraphs.

In reference to paragraph one, "that the Court erred in treating respondent's motion as a motion for summary judgment under Rule 12B of the Federal Rules of Civil Procedure", libelants are correct in this contention, and the Court's application of the Federal Rules of Civil Procedure was incorrectly used and referred to. However, such misapplication of reference to the Federal Rules does not change the Court's reasons for directing the vacating of the attachment against the vessel Caribe, which reasons will be later referred to.

[fol. 158] Items 2 and 3.

The motion on which the Court acted was filed herein on March 15, 1948, and such motion sought the dismissal of the libel and amended libel and the vacating of the attachment on the vessel Caribe.

In the case of United States vs. Specified Quantities, etc., 7 Fed (2) 835, the Second Circuit Court of Appeals through Judge Haugh said:

"It is enough to hold as we do, that, either at law or in admiralty, the validity of an attachment or propriety of a seizure in rem can always be raised by a motion to vacate. The practice is elementary. Therefore it was proper to move to vacate this seizure."

The above authority disposes of the grounds contained in paragraphs 2 and 3.

Items 4 and 5.

As to paragraphs 4 and 5 relative to the statements contained in affidavit of proctor for respondent, this affidavit with five exhibits were filed March 15, 1948, and

were filed in support of motion to dismiss amended libel and for vacating attachment.

Under section 456, page 283, of Benedict on Admiralty (Sixth Edition) the author states:

"In case a motion is resorted to, the facts must be brought before the Court by affidavits or by proper reference to the pleadings, depositions or other documents."

[fol. 159] In Federal case No. 6096, The Harriet, a motion was made that libelants be required to file additional security for costs. This motion was opposed, upon the ground that the affidavit upon which the motion was based was made by the proctor and not by claimant. The Federal District Court of New York through Judge Betts said:

"The Courts of law, as a general rule, require affidavits to the merits of a cause, and in those instances, where the diligence and good faith of a party are in question, to be made by the party himself. Still the rule in those cases is not inflexible, for the deposition of an attorney or other person may be substituted, when good cause is shown for the change. Sullivan v. Magill 1. H. Bl 637; Peake 97; Geib v. Icard 11 Johns. 82; Roosevelt v. Dale, 2 Cow. 581; Chase v. Edwards 2 Wend. 283. In strictness, the principle upon which the affidavit of the actual party is demanded would scarcely apply to proceedings in admiralty Courts, as the proctor there, for many purposes, is in fact dominus litis, clothed with all the authority, and bearing the responsibilities of the party himself. Clerke, Praxis Adm. Tits. 7, 48, 51; Betts, Adm. 10. Although, by the rules of this Court, its practice is assimilated to that of the supreme Court of the state upon questions which it has not specifically provided for, yet that would not change essentially the features of admiralty practice, when variant from that of common law. But I think in this case, it is in consonance with the established course of law Courts to allow affidavits, on motions incidental to a cause, and when the facts cannot be supposed to rest peculiarly in the knowledge of the party, to be made by attorney and proctors. 2 Wend. 283. This is the invariable course in [fol. 160] Courts proceeding according to the civil law, the source of the admiralty practice, without reference to any special functions to a proctor differing from a mere attorney."

In the case of Burlew Hardware Co. vs. City of Spencer, the Supreme Court of Appeals of West Virginia through Judge Woods as reported in 127 S. E. 727 said:

"An affidavit is not a pleading in which allegations of conclusions of fact may be permissible; on the contrary, it is a statement of fact from which judicial conclusions may be drawn. McLaughlin vs. McCann 123 App. Div. 67, 107 N. Y. S. 762. The Court looks to the affidavit to ascertain whether the facts appear that are essential to give the Court jurisdiction to order the parties named in the affidavit to interplead. The plaintiff, of course, has the right to challenge the sufficiency of the affidavit by objection or motion to quash, and the Court's action thereon is reviewable on appeal, not on certificate."

Proctors for libelants at no time offered any objection to the filing of the affidavit in question and neither was there filed a motion to quash and the statements contained in the affidavit were not controverted.

Where an affidavit is filed and opposing counsel does nothing to test its competency, or to controvert such statements, their acquiesence should by all legal reasoning amount to an admission of all statements of fact contained in that affidavit.

The common law rules of evidence are not strictly followed or applied in Courts of admiralty, and a Court of admiralty is privileged to exclude such parts of the evidence that are incompetent and irrelevant and may accept the remainder.

[fol. 161] Comparing the allegations contained in supplemental libel with the statements set forth in the affidavit, it is apparent that the statements in the affidavit are no more than admissions or confirmation of the facts alleged in supplemental libel.

For the purpose of passing on respondents' motion to vacate the attachment herein, if the affidavit of Charles Ramirez as proctor for respondent would disregard in its entirety and if the Court would confine its consideration alone to the allegations contained in the record, such allegations are sufficient to support the Court's order of sustaining respondents' motion to vacate the attachment.

Accepting the allegations contained in libelants' complaint and supplemental complaint as true, we have the following alleged facts:

"The contract of affreightment was between libelants and the corporation, Compania Transmaritima Colombiana, for delivery of cargo by the vessel Cali (which, for brevity, this corporation will be hereafter referred to as the 'Corporation Cali'). This vessel and cargo was lost January 17, 1948 and delivery was never completed.

"Between January 17, 1948 and March 1, 1948 the 'Corporation Caribe' was organized under the laws of the Republic of Colombia.

"On March 7, 1948 libelants instituted this proceedings against the 'Cali Corporation' seeking recovery for such loss with order of foreign attachment.

"On March 8, 1948, a supplemental and amended libel was filed making the Corporation 'Compania Colombiana Del Caribe' a party respondent. (For the purpose of brevity this corporation will be referred to as 'Caribe Corporation.')"

[fol.162] By this supplemental libel it was alleged that:

"On March 4, 1948 there was organized under the laws of Colombia a corporation known as 'Compania Colombiana Del Caribe.'

"That the 'Caribe Corporation' appeared before the customs and port officials of Baranquilla, Colombia, on or about March 4, 1948, and petitioned to have the name of the vessel Alacran changed to Caribe and further petitioned to have the Alacran register changed accordingly and a new register was issued for said steamship Alacran by said Colombian officials in which said vessel was designated the steamship Caribe."

Libelants here admit the incorporation of the "Caribe Corporation" and of its being incorporated under the laws of Colombia and the transfer of the vessel Caribe having been completed under the laws of the Republic of Colombia. The only attack on such incorporation and transfer is that such incorporation and transfer was:

"A. An attempt to divest itself of its property and assets and particularly the steamship Alacran in fraud of libelants' rights.

"B. That the 'Corporation Caribe' was organized by the directors, officers, and stockholders of the 'Corporation Cali' and no monies were paid into its treasury for

the issuance of the stock thereof, if any stock were actually issued.

"C. That the attempted transfer of the steamship Alacran from the 'Corporation Caribe' was not for a real or valu-[fol. 163] able consideration and no equitable price was paid therefor,

"D. And such transfer was fictitious and an attempt to defraud libelants of their rights."

No allegation is made that the vessel Alacran was ever transferred, but the libel does state that "said attempted transfer was wholly fictitious and an attempt to defraud libelants of their rights". The above allegations, if conceded to be true, are insufficient to state a cause of action in admiralty. Perhaps it was the intention or purpose of such pleading to make a creditors bill, but even then libelants have failed to state sufficient facts to constitute a creditors bill against respondent, the "Corporation Caribe". A creditors bill is not maintainable until after a judgment is rendered and an execution issued on such judgment and a return of no property found.

In view of the fact that the "Corporation Caribe" was organized under the laws of the Republic of Colombia, and the entire transaction of sale and transfer of the vessel Caribe was conducted and completed under the laws of Colombia, then the law of Colombia must be looked to and applied in determining whether such corporation was organized to perpetrate a fraud on libelants or whether the transfer of the vessel Caribe was so fictitious as to amount to a fraud against libelants. If a fraudulent scheme or transaction was carried out and completed under the laws of that foreign government, then the jurisdiction for setting aside such transaction remains in that foreign jurisdiction. In any event, this Court as one of admiralty does not have jurisdiction to inquire into the validity of such alleged acts.

[fol. 164] Both the pleading and exhibits establish that title to the vessel Caribe had passed to the "Corporation Caribe". (See certificate of Registry No. 29 filed as exhibits on March 15, 1948, and affidavit of John Bowie as Master of the vessel filed March 15, 1948.)

Until a judgment is directed by some Court of competent jurisdiction adjudging the transfer of the vessel Caribe to be a fraudulent transaction and thereby annulling such transfer, there is nothing left for this Court to order other than to hold that the vessel Caribe is the property of the "Corporation Caribe" and by reason of such ownership is not subject to the foreign attachment levied herein on the vessel Caribe.

One of the first essentials for a plea in admiralty is an allegation of facts sufficient to establish jurisdiction. Jurisdiction in admiralty must be affirmatively shown on the face of the libel, and it is not sufficient that it may be inferred argumentatively from the averments as no presumption arises in favor of the jurisdiction of a federal Court.

"El Ariente" 5 Federal Reporter (2) 251 California-Atlantic S. S. Co. vs. Central Door & Lumber Co., 206 Federal 5.

Looking to the supplemental plea by which the "Corporation Caribe" was brought into Court and under which the process of foreign attachment was issued and levied on its property, we find not one jurisdictional fact alleged which may confer jurisdiction on this Court for a proceeding in admiralty.

The only attempt to allege any jurisdictional facts are those allegations contained in paragraph 1 of the sup-lemental and amended libel which is as follows:

[fol. 165] "Libelants reiterate and reallege all of the allegations contained in Article I through VIII inclusive of the original libel; wherever reference is made to 'respondent' in the allegations contained in said articles, said reference is to respondent 'Compania Transmaritima Colombiana, S. A.'"

Such a reference is contrary to all rules of pleading whether in common law or admiralty, and a defendant being proceeded against is only answerable to the specific charge contained in that particular pleading under which such process was issued. Such defendant is not compelled to seek other information or facts other than those contained in that complaint and particularly so in admiralty where a copy of such complaint is served on the respondent.

This Court is of the opinion that the above quoted allegations are not sufficient to avoid a necessary allegation to be contained in the supplemental and amended libel, and

therefore the motion to dismiss which was sufficient to test the lack of jurisdictional facts was sustained.

Metropolitan S. S. Co. vs. Pacific-Alaska Nav. Co., 260 Federal 973.

It is hereby ordered that the libelants' motion for rehearing be and the same is hereby overruled with exceptions to libelants, and the order heretofore tendered on September 27, 1948, will be amended and entered on November 10, 1948, and said order when so amended shall further [fol. 166] provide that the execution and enforcement of the above order is hereby stayed for a period of ten days from and after entry of this order under Admiralty Rule 31 of this Court.

Joseph J. Hancock, Judge.

November 5, 1948.

Filed Nov. 5, 1948 in the office of the Clerk of the U. S. District Court for the Canal Zone.

C. T. McCormick, Jr., Clerk.

Attest A True This Nov. 5, 1948.

(Sgd.) C. T. McCormick, Jr., Clerk, U. S. District Court. (Seal)

[fol. 167] ORDER VACATING ATTACHMENT OF SS CARIBE, EX-ALACRAN

No. 2798

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE DISTRICT OF THE CANAL ZONE, BALBOA DIVISION:

SWIFT & COMPANY, PACKERS, V. MERCADE Y CIA, S EN C, CIA Industrial y Comercial Casal, Alonso Martinez e Hijo, Sobrinos Abasael S. L., E. Labrador y Cia, S en C, A. Diez y Cia, J. Noto y Cia, Arias S. A., Garcia Marquin V Cia, V. Martinez y Cia, Cacicedo y Cia, Fernando Campa, Jose Gomez Martinez and Luis A. Noboa N., Libelants,

against

COMPANIA TRANSMARITIMA COLOMBIANA, S. A., AND COMPANIA COLOMBIANA DEL CARIBE, S. A., Respondents

(Entered November 10, 1948.)

The respondent Compania Colombiana del Caribe, S. A., a corporation, having moved the Court for an order and decree vacating the attachment of the Colombian steamship Caribe, ex-Alacran, now in the custody of the Marshal of this Court, and dismissing the amended and supplemental libel herein as to the said respondent upon the several grounds set forth in its notice of motion filed herein on August 16th, 1948, and documentary proofs in support of its said motion having been offered, and

The said motion having come on regularly to be heard on the pleadings herein and the said documentary proofs, no proofs having been offered by the libelants other than the allegations of their libel and amended and supplemental [fol. 168] libel herein, and the motion having been argued by proctors for the said respondent and for the libelants and submitted to the Court for decision, and the Court having fully considered the pleadings, proofs and arguments and having, on September 20, 1948 rendered and filed its opinion and its findings of facts and conclusions of law, and

The Court having found, among other things, that at the time of the filing of the libel herein and at the time of the levy of each of the attachments herein upon the steamship Caribe, the said steamship was solely owned and op-

erated by the said respondent Compania Colombiana del Caribe, S. A., and was not the property of or operated by the respondent Compania Transmaritima Colombiana, S. A., and the Court having concluded that no facts are alleged in the libel or amended and supplemental libel which connect the respondent Compania Colombiana del Caribe, S. A. in any respect with the maritime contract of affreightment between the libelant Noboa and the respondent Compania Transmaritima Colombiana, S. A. or with the loss of or damage to the cargo shipped on the M/V Cali pursuant to the said contract, and that the amended and supplemental libel fails to state facts sufficient to constitute, as against the respondent Compania Colombiana del Caribe, S. A., any cause or suit within the admiralty and maritime jurisdiction of the United States or of this Court, and

The Court having determined in the alternative that if this Court has any jurisdiction over the claims asserted in the amended and supplemental libel as between the libelants and the respondent Compania Colombiana del Caribe S. A., (other than to the extent that the said respondent is proceeded against as garnishee as to property, credits and [fol. 169] effects of the respondent, Compania Transmaritima Colombiana, S. A., in its control at the time of the attachment herein) this Court should and does hereby decline to exercise the same,

Now, Therefore, It Is Hereby Ordered, Adjudged And Decreed:

1. That the attachments of the steamship Caribe (ex-Alacran) be and each of them is hereby vacated and discharged and the said steamship is hereby released and discharged therefrom;

2. That the Marshal of this District be and he is hereby authorized and directed forthwith to deliver the said steamship to the respondent Compania Colombiana del Caribe, S. A., or to its delegate, free of all costs and charges connected with his seizure and custody thereof and to look to the libelants and their stipulator for costs for any and all unpaid costs and charges connected with the said attachment.

3. That the respondent Compania Colombiana del Caribe, S. A., have and recover its costs incident to the attachment of the said steamship from the libelants and their stipulator

for costs, and costs to be taxed within 30 days from the date hereof.

4. That within 30 days from the date of this order, the respondent Compania Colombiana del Caribe, S. A., make answer as garnishee respecting any and all funds, indebted-[fol. 170] ness, money or property which it owes or has in its hands, belonging to the respondent Compania Transmaritima Colombiana, S. A., and

It Is Further Ordered, Adjudged And Decreed, that the execution and enforcement of this order is hereby stayed for ten (10) days after service of a copy of this order with notice of entry thereof upon the adverse party or its proctors.

Dated: November 10th, 1948.

(Signed) Joseph J. Hancock, Judge.

Petition for Appeal

[Title omitted]

To The Honorable, The Judges of the United States Court Of Appeals for the Fifth Circuit:

The petition of Swift & Company, Packers, Arias S. A., Cia Industrial y Commercial Casal, Alonso Martinez e Hijo, Sobrinos Abascal, S. L., A. Diez y Cia, Noto y Cia, Garcia Barquin y Cia, V. Martinez y Cia, Cacicedo y Cia, V. Mercade y Cia S en C, E. Labrador y Cia, S en C, Fernando Campa, Jose Gomez Martinez, and Luis A. Noboa N., libelants herein, respectfully shows as follows:

I

That on or about the 7th day of March, 1948, the libelants herein filed their libel in the District Court of the United [fol. 171] States for the District of the Canal Zone against Compania Transmaritima Colombiana, S. A., in a cause of cargo shortage and/or damage, civil and maritime, to recover about $380,000.00 for alleged damages to cargo owned by said libelants, with a clause of foreign attachment, as by reference to said libel will more fully appear, under which, said respondent not being found within the said district, the Steamship Caribe was attached.

II

That on or about March 8, 1948, the libelants herein filed a supplemental and amended libel in the District Court of the United States for the District of the Canal Zone, on the same cause of action, in which Compania Colombiana Del Caribe, S. A., was made a party respondent with a clause of foreign attachment, as by reference of said supplemental and amended libel will more fully appear, and under which the said Steamship Caribe was again attached.

III

That such proceedings were thereafter had in this case that this cause came on for hearing on briefs on motions of said respondents to dismiss the libel and the amended and supplemental libel and to vacate the attachments of the Steamship Caribe, which said motions were overruled without prejudice by order of Honorable Bunk Gardner, the then Judge of the United States District Court for the District of the Canal Zone.

[fol. 172] IV

That thereafter under date of June 11, 1948, the aforesaid respondents filed their answers in the records of this Court.

V

That such proceedings were thereafter had in this case that this cause came on for hearing and argument before Honorable Joseph J. Hancock, United States District Judge for the District of the Canal Zone, on the motion of respondent Compania Colombiana Del Caribe, S. A., to dismiss the action as to said respondent and to vacate the attachment of the Steamship Caribe.

Thereafter on the 10th day of November, 1948, a final decree was made and entered in this cause whereby it was ordered, adjudged and decreed that the libel be dismissed as to respondent Compania Colombiana Del Caribe, S. A., and that the attachments of the Steamship Caribe be vacated.

VI

That libelants are advised and believe that said final decree and said decision thereon rendered are erroneous in that the decision and decree did not overrule the aforesaid motions.

Your petitioners therefore pray that they may be allowed to appeal from said final decree to the next term of the United States Court of Appeals for the Fifth Circuit, with supersedeas, and that the execution of the decree releasing the Steamship Caribe from the aforesaid attachments be [fol. 173] stayed pending the final determination of said appeal and that the attachments of the said Steamship Caribe remain in full force and effect pending the disposition of this appeal by the United States Court of Appeals for the Fifth Circuit; and that a transcript of record of the proceedings and papers upon which said decree was made, duly authenticated, may be sent accordingly to said United States Court of Appeals for the Fifth Circuit and that the usual citation may issue in order that the said decree may be reviewed and reversed by the said United States Court of Appeals for the Fifth Circuit.

Your petitioner further prays for all general and equitable relief.

McGrath, Sheridan & Thomas, Deutsch, Kerrigan & Stiles, Proctors for Petitioners.

(Filed November 15, 1948.)

VERIFICATION

William J. Sheridan, Jr., being duly sworn deposes and says:

That he is one of the proctors for libelants named in the above and foregoing petition; that he makes this affidavit because libelants are corporations, limited companies, partnerships and individuals; that none of the officers or partners of said corporations, limited companies or partnerships is within this district; and that none of the individuals are within this district; that the facts set forth in the petition [fol. 174] are true to the best of his knowledge, information and belief; and that the said appeal is not taken for the

purpose of delay but because petitioners believe that injustice has been done.

(S.) W. J. Sheridan, Jr.

Sworn to and subscribed before me this 15th day of November, 1948.

(S.) C. T. McCormick, Jr., Clerk of Court. (Seal)

(Filed November 15, 1948.)

ORDER

Considering the foregoing petition, it is ordered that the appeal herein be allowed as prayed for; that the decree vacating the attachments of the Steamship Caribe be stayed pending the disposition of the appeal; that the attachments of the Steamship Caribe be maintained in full force and effect pending the disposition of the appeal, upon libelants furnishing security in the amount of $30,000.00 for the use and detention of the vessel Caribe and to recover the costs of the action, costs on appeal, interest and damages for delay which respondent Compania Colombiana Del Caribe, S. A., may be subjected to by reason of the appeal from judgment heretofore entered herein, which judgment determined the disposition of the vessel Caribe in controversy, and which vessel is in the custody of the Marshal of this Court.

[fol. 175] The Court having arrived at the amount of bond and having fixed the amount at the sum of $30,000.00 did so upon having before it facts relative to the condition and seaworthiness of the vessel Caribe, and upon the belief that such appeal would be disposed of on or before February 1, 1949, and in the event that such appeal is not decided or disposed of by that date by the Appellate Court, that such Appellate Court will upon motion duly made increase if proper the amount of such bond to such extent or amount as such Appellate Court may deem proper and necessary.

(S.) Joseph J. Hancock, Judge.

Dated: November 15, 1948.

Entered November 15, 1948.)

Notice of Appeal

In the District Court of the United States in and for the District of the Canal Zone, Balboa Division

No. 2798 In Admiralty

Swift & Company Packers, et al, Libelants,

vs.

Compania Transmaritima Colombiana, S. A., and Compania Colombiana Del Caribe, S. A., Respondents.

Sirs:

Please take notice that Swift & Company, Packers, Arias S. A., Cia Industrial y Commercial Casal, Alonso Martinez [fol. 176] e Hijo, Sobrinos Abascal, S. L., A. Diez y Cia, Noto y Cia, Garcia Barquin y Cia, V. Martinez y Cia, Caicedo y Cia, V. Mercade y Cia S en C, S. Labrador y Cia, S en C, Fernando Campa, Jose Gomez Martinez, and Luis A. Noboa N., libelants in the above entitled and numbered cause hereby appeal with supersedeas to the next United States Court of Appeals for the Fifth Circuit to be held in the United States Court House (Postoffice Building), City of New Orleans, from the final decree of this Court, dismissing the libel herein as to respondent Compania Colombiana Del Caribe, S. A., and vacating the attachments of the Steamship Caribe, entered herein on the 10th day of November, 1948, and from each and every part of said decree.

Yours, etc.
McGrath, Sheridan & Thomas, Deutsch, Kerrigan & Stiles, Proctors for Libelants.

Ancon, Panama, Canal Zone 15th day of November, 1948.

To: C. T. McCormick, Jr. Esq., Clerk of Court. Messrs. Van Siclen & Ramirez, P. O. Box 124, Ancon, Canal Zone. Messrs. Nelson, Healy, Baillie & Burke, 52 Broadway, New York 4, N. Y., Proctors for Respondents.

[fols. 177-180] BOND ON APPEAL STAYING EXECUTION

(Filed November 15, 1948.)

[Omitted.]

[fol. 181] (Title omitted)

SIRS:

Please take notice that the bond on the appeal herein, with supersedeas, has been this day filed in the office of the Clerk of the District Court of the United States in and for the District of the Canal Zone, and executed and given by libelants herein, as principals, and United States Fidelity and Guaranty Company, as surety.

Yours, etc., McGrath, Sheridan & Thomas, Deutsch, Kerrigan & Stiles, Proctors for Libelants-Appellants.

Ancon, Panama, Canal Zone, 17th day of November, 1948.

To: Messrs. Van Siclen & Ramirez, P. O. Box 124, Ancon, Canal Zone. Messrs. Nelson, Healy, Baillie & Burke, 52 Broadway, New York 4, N. Y. Proctors for Respondents-Appellees.

ASSIGNMENT OF ERRORS—Filed November 17, 1948

(Title omitted)

The libelants, Swift & Company, Packers, Arias S. A., Cia Industrial y Commercial Casal, Alonso Martinez e Hijo, Sobrinos Abascal, S. L., A. Diez y Cia, Noto y Cia, Garcia Barquin y Cia, V. Martinez y Cia, Cacicedo y Cia, [fol. 182] V. Mercade y Cia S en C, E. Labrador y Cia, S en C, Fernando Campa, Jose Gomez Martinez, and Luis A. Noboa N., hereby assign error in the proceedings, decrees, and decisions of the District Court in the above entitled action as follows:

1. The Court erred in determining the question of its jurisdiction upon a motion and ex parte affidavit particularly where the jurisdictional facts were in dispute.

2. The Court erred in considering matters set forth

of the statements made therein would be excluded under the hearsay rule.

3. The Court erred in holding that unless statements contained in a hearsay affidavit are controverted or a motion is made to "quash" the affidavit, such statements are to be considered as admitted.

4. The Court erred in holding that the hearsay statements in the affidavit of respondents counsel were not controverted.

5. The Court erred in finding as a fact that, at the times the Steamship Caribe was attached, she was the property of Compania Colombiana del Caribe, S. A.

6. The Court erred in holding that until a judgment is directed in some Court of competent jurisdiction adjudging the transfer of the Steamship Caribe to be a fraudulent transaction and thereby annulling such transfer it could [fol. 183] do nothing other than to hold that the vessel was the property of Compania Colombiana del Caribe, S. A.

7. The Court erred in not holding that libelants' pleadings alleged that Compania Transmaritima Colombiana, S. A., was the owner of the vessel at the times when she was attached.

8. The Court erred in holding that a Court of admiralty does not have jurisdiction to inquire into the bona fides of a transaction which purported to transfer title to property seized by a writ of foreign attachment.

9. The Court erred in holding that a Court of admiralty does not have jurisdiction to inquire into a fraudulent and simulated sale of a vessel made by a shipowner for the purpose of defeating the rights of cargo owners.

10. The Court erred in its analysis of the allegations of the amended and supplemental libel.

11. The Court erred in holding that the allegations of the amended and supplemental libel, if conceded to be true are insufficient to state a cause of action in admiralty.

12. The Court erred in holding that under the amended and supplemental lib[illegible] "no subject of maritime qualification" is alleged.

13. The Court erred in holding that an amended and supplemental libel may not, by reference, incorporate allegations contained in the original libel.

[fol. 184] 14. The Court erred in holding that because a fraudulent scheme or transaction was carried out and completed in a foreign country then the jurisdiction for setting aside such transaction "remains" in such foreign jurisdiction.

15. The Court erred in holding that any action based on charges of fraud contained in the amended and supplemental libel should be undertaken in the Courts of the Republic of Colombia.

16. The Court erred in sustaining a motion which had been overruled by his predecessor in office.

17. The Court erred in dismissing the libel as to Compania Colombiana del Caribe, S. A., and vacating the attachments of the Steamship Caribe.

Deutsch, Kerrigan & Stiles, McGrath, Sheridan & Thomas, Proctors for Libelants.

Ancon, Canal Zone November 12, 1948.

(Filed November 17, 1948)

[fol. 185] LIBELANT'S PRAECIPE

(Filed November 23, 1948)

(Title omitted)

To: C. T. McCormick, Jr., Esq., Clerk of the District Court of the United States for the District of the Canal Zone:

SIR:

We hereby request that the record on appeal in the above entitled case shall include the following:

(1) Original libel.
(2) Stipulation for costs.
(3) Process of foreign attachment.
(4) Supplemental and amended libel.

(5) Interrogatories propounded to respondent Compania Colombiana Del Caribe, S. A.

(6) Process issued in accordance with prayer of amended and supplemental libel.

(7) Claim.

(8) Respondents stipulation for costs.

(9) Motion of Compania Colombiana Del Caribe, S. A., for an order dismissing the libel and the amended libel and vacating the attachment.

[fol. 186] (10) Notice of motion of Compania Colombiana Del Caribe, S. A., to which is attached

A. Affidavit of Charles R. Ramirez, dated March 15, 1948, as proctor for Compania Colombiana Del Caribe, S. A., to which is attached

1. Copy of face of Bill of Lading No. 1 (Cienfuegos delivery) marked "Exhibit A."

2. Copy of face of Bill of Lading No. 1 (Santiago de Cuba delivery) marked "Exhibit B".

3. Copy of face of Bill of Lading No. 2 (Santiago de Cuba delivery) marked "Exhibit C".

4. Translation of Certificate of Registry of Steamship Caribe.

5. Opinion of Ascanio Mulford.

(11) Notice of special appearance and exception to jurisdiction of Compania Transmaritima Colombiana S. A.

(11-A) Notice of Special Appearance and Exception to Jurisdiction of Compania Colombiana del Caribe, S. A.

(12) Order of Bunk Gardner, Judge, overruling motions of respondents.

(13) Stipulation dated April 14, 1948, granting respondents until May 17, 1948, within which to answer the libel and interrogatories.

[fol. 187] (14) Stipulation dated May 12, 1948, granting respondents until June 17, 1948, within which to answer the libel and interrogatories.

(15) Answer of Compania Transmaritima Colombiana, S. A.

(16) Answer of Compania Colombiana Del Caribe, S. A.

(17) Exceptions and objections of Compania Colombiana Del Caribe, S. A., as garnishee, to libelants interrogatories.

(18) Motion of Compania Transmaritima Colombiana, S. A. and Compania Colombiana Del Caribe, S. A., for an

order vacating the attachment and dismissing the amended and supplemental libel, filed August 17, 1948, to which is attached

A. Notice of motion by Compania Colombiana del Caribe, S. A., to which is attached

1. Affidavit of Charles E. Ramirez as proctor for Compania Colombiana Del Caribe, S. A.

(18-A) Minutes of proceedings on August 30, 1948.

(19) Opinion of Joseph J. Hancock, Judge of the United States District Court for the District of the Canal Zone, filed September 20, 1948.

[fol. 188] (22) Motion of libelants for rehearing filed October 6, 1948.

(23) Notice of motion filed October 6, 1948.

(24) Answer to motion of Compania Colombiana Del Caribe, S. A., filed October 1948,

(24-A) Minutes of October 11, 1948.

(25) Affidavit of W. J. Sheridan, Jr., dated October 27, 1948.

(26) Interrogatories addressed to Johnson & Higgins as garnishee and the answers of Johnson & Higgins, thereto in proceedings entitled "Swift & Company Packers, et al., Libelants, vs. Compania Transmaritima Colombiana, S. A., Respondent", No. A 15624 of the Admiralty Docket of the United States District Court for the Southern District of New York.

(27) Deposition of A. J. Peterson, President of the United States National Bank at Galveston, Texas in the matter entitled "Swift & Company, et al. vs. Walter W. Keene, et al." No. 1877 of the Admiralty Docket of the United States District Court for the Southern District of Texas, together with Exhibits "A" to "F" inclusive.

(28) Opinion of Judge Hancock overruling libelants motion for a rehearing.

(29) Final decree dismissing the suit as to Compania Colombiana Del Caribe, S. A., and vacating the attachments of the Steamship Caribe.

[fol. 189] (30) Petition for appeal and order allowing appeal.

(31) Notice of Appeal.

(32) Supersedeas Bond.

(33) Notice of filing Supersedeas Bond.

(34) Assignment of Errors.
(35) This Praecipe.

Very truly yours, Deutsch, Kerrigan & Stiles, McGrath, Sheridan & Thomas, Proctors for Libelants.

PRAECIPE OF RESPONDENT, COMPANIA COLOMBIANA DEL CARIBE, S. A.

(Title omitted)

To: C. T. McCormick, Jr., Esq., Clerk of the District Court of the United States for the District of the Canal Zone:

SIR:

We hereby request that the record on appeal in the above-entitled cause shall include the following, in addition to the papers listed in the libelants' praecipe:

(1) The marshal's return on process issued under the original libel.
[fol. 190] (2) The marshal's return on process issued under the supplemental and amended libel.
(3) The minutes of the proceedings on August 30, 1948.
(4) The minutes of the proceedings on October 11, 1948.
(5) The notice of special appearance and exception to jurisdiction of Compania Colombiana del Caribe, S. A.
(6) This praecipe of respondent Compania Colombiana del Caribe, S. A.

We request that the verifications annexed to the original libel (Item 1 of libelants' praecipe) and the supplemental and amended libel (Item 4 of libelant's praecipe) and the certificate of the Vice-Consul attached to the translation of the Certificate of Registry (Item 10 (A) (4) of libelants' praecipe) be included in the record in full.

We request that a typewritten note be included in the record, following the deposition of A. J. Peterson (Item 27 of libelants' praecipe) noting our objection to the inclusion in the record on appeal of that item, the affidavit of W. J. Sheridan, Jr., dated October 27, 1948 (Item 25 of libelants' praecipe) and the Interrogatories addressed to John-

son & Higgins and the answers thereto (Item 26 of libelants' praecipe).

Yours very truly, Van Siclen & Ramirez, Nelson, Healy & Baillie, Proctors for Respondent, Compania Colombiana del Caribe, S. A.

[fol. 191] Clerk's Certificate to the Apostles (omitted)

[fol. 192] That thereafter the following proceedings were had in said cause in the United States Court of Appeals for the Fifth Circuit, viz:

ARGUMENT AND SUBMISSION

Extract from the Minutes of March 14th, 1949

No. 12608

SWIFT AND COMPANY, PACKERS, ET AL.,

versus

COMPANIA COLOMBIANA DEL CARIBE, S. A.

On this day this cause was called, and after argument by Harry F. Stiles, Jr., Esq., for appellants, and Nicholas J. Healy, 3rd., Esq., for appellee, was submitted to the Court.

OPINION OF THE COURT AND DISSENTING OPINION OF McCORD, CIRCUIT JUDGE—Filed May 30, 1949

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 12608

SWIFT AND COMPANY, PACKERS, ET AL., Appellants,

versus

COMPANIA COLOMBIANA DEL CARIBE, S. A., Appellee

Appeal from the District Court of the Canal Zone

(May 30, 1949)

Before Sibley, McCord, and Waller, Circuit Judges

SIBLEY, Circuit Judge:

On March 7, 1948, Swift and Company, Packers, a Corporation of Nevada, U. S. A., joined by several corporations and citizens of Cuba and a citizen of the Republic of Colombia, brought a libel *in personam* in the District—of [fol. 193] the Canal Zone against Compania Transmaritima Columbiana, a corporation of the Republic of Colombia, to recover for the loss of a cargo of rice by the wrecking of the vessel Cali, owned by the respondent, off the island of Grand Cayman. The cargo was shipped at Guayaquil, Ecuador, for Cienfuegos, Cuba, and libelants severally bought interests in it while in transit. Process was prayed against respondent, or if it could not be found within the District, then by foreign attachment against its goods and chattels within the District, and particularly a vessel known as the Alacran, or Caribe. Process was issued accordingly, and the Marshal returned that he had served it on March 8 by going aboard the named vessel in the Canal locks and delivering a copy to the master, and taking into custody the vessel and her tackle, etc., and also some gear, hoists, winches, etc., from the vessel Cali, as goods and chattels of respondent. The same day a supplemental and amended libel was filed which on information and belief charged that about four days previously a new corporation, Compania Colombiana del Caribe, had been formed under the laws of Colombia to take over respondent's property, and especially

the vessel Alacran, renamed the Caribe, in fraud of libelant's rights, but the two Companies were really one and the same. Alternatively it was alleged that the new Company is indebted to respondent for the purchase price of the Caribe. New process was prayed against both Companies, and if not found, against their goods and chattels by foreign attachment, and that the Caribe be attached as the property of the original respondent and as security for the unpaid purchase money, and that the new respondent answer on oath as garnishee. There was a prayer that both respondents pay to libelants their several damages as at first claimed. The marshal made a similar return on this process. In neither return did he say that respondents were not found in the district. The master of the Caribe on March 15 filed a claim in behalf of the new corporation, swearing it was the *bona fide* owner and he in possession as its lawful bailee, and gave a cost bond. On the same day the new Company by its proctors made a motion, supported by an affidavit which is mainly a legal argument, that the court decline jurisdiction and vacate the attachment, on the grounds that the case is between foreigners, that the Caribe is not responsible for the damages claimed, and the question of alleged fraudulent transfer is a matter [fol. 194] to be decided in the Republic of Colombia where it was made. There were exhibited the bills of lading for the rice, an opinion of a Colombian attorney that the transfer of the Alacran was not fraudulent under the laws of Colombia, and an authenticated copy of the registration of the Caribe as owned by the Compania del Caribe made at Barranquilla, Colombia, on March 4, 1948. The motion was overruled by the judge while he was absent in Kentucky. Two months later the original respondent answered to the merits, admitting the loss of the rice, but denying liability for reasons stated, and claiming a limitation of liability to the value of its interest in the Cali and her pending freight. The second respondent also answered to the merits, denying liability, and affirming its good faith ownership of the Caribe, and praying for a decree to that effect.

The district judge, having retired as such without returning to the Canal Zone, was succeeded by a new judge, and after another two months, on August 16, 1948, the proctors for the second respondent again moved to vacate the attachment of the Caribe, and to dismiss the supplemental libel

as to itself on the grounds that no cause in admiralty was alleged against this respondent or the Caribe, and there was no jurisdiction to subject her to a lien, or to proceed in garnishment; that the matters alleged against this respondent belong to the jurisdiction and commerce of Colombia, and it is against good policy to seize in the Canal for debt vessels passing through. A new and more factual affidavit was submitted as to the ownership of the Caribe, as to the separate stockholding and officering of the new corporation, and the pendency in other jurisdictions of two other libels by libelants for the same damages against the original respondent and others. No reply affidavit was offered, and no objection was made by libelants to the consideration of those on file. On August 30, 1948, the motion was heard and briefs submitted, and the judge found the facts to be that the Cali was beached and lost Jan. 17, 1948; that in the latter part of February, 1948, citizens of the Republic of Colombia formed under the laws of Colombia the corporation Compania Colombiana del Caribe, some but not all the stockholders being stockholders in Compania Transmaritima Columbiana;* the managing officers of the [fol. 195] two corporations were different persons, except that one was chairman of the Board of Directors of both. The affidavit filed by movant states the Alacran was sold to the new corporation on Feb. 25, 1948, by public deed No. 4 made before the Consul General of Colombia in Panama, and recorded in the public records. On March 4 the name was changed to Caribe and the vessel registered in that name as owned by the new corporation at Barranquilla, Colombia. She was seized March 8 in the Canal. The court then held that while there was a proper claim in admiralty against the Compania Maritima *in personam*, there was no direct claim against the Compania del Caribe, for that corporation did not exist when the cargo was lost, and if because of fraud in disposing of assets to it Compania del

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* The affidavit is that Keene, who owns 39 percent of the stock in the Transmaritima, owns about the same percent in del Caribe; but Echeverri, who owns 12 percent in Transmaritima, owns 58 percent in del Caribe; that Losada and Marulanda, who own 12 and 36 percent in Maritima, own none in del Caribe; and that three other stockholders in del Caribe own no stock in Maritima.

Caribe was accountable in equity, still that would not be a maritime claim. Consequently no claim of which the court has jurisdiction is stated against that corporation, and it can be held only as garnishee for any property or effects it may have in its hands belonging to Compania Maritima. He further held that if there was jurisdiction to enquire into the organization of the new corporation and the acquisition of the Alacran, since it all depended on the laws of Colombia and all witnesses were there, and since all but one libelant are foreigners, as are both the respondents, he would exercise his discretion to decline the enquiry. On motion for rehearing these views were adhered to, and the evidence by affidavit having been criticized, he held that the main facts sufficiently appeared from libelants' pleadings and the documentary proofs. It was adjudged that the attachment of the Caribe be vacated and the vessel delivered to Compania del Caribe free of costs and charges incident to seizure and custody, but that an answer as garnishee be made by Compania del Caribe within thirty days. This appeal was thereupon taken.

1. We gravely doubt that the order is appellable, not being final nor determining fully any party's rights. We resolve the doubt in favor of our jurisdiction because the [fol. 196] vessel, now held for more than a year, ought to be disposed of. The court correctly held that no maritime liability is asserted against the Compania del Caribe or the vessel Caribe; and that the libel *in personam* against the Compania Maritima is good, as is the garnishment against Compania del Caribe, requiring it to answer as to all property of the other Company in its hands and debts owing to it.

2. As to the foreign attachment of the Caribe as the property of the Compania Maritima, we note that the Marshal did not return that respondent was not to be found in his district. Unless he failed to find the respondent, neither Admiralty Rule 2 nor the process in his hands authorized him to attach any property. But as the fact of the respondent's absence is apparently unquestioned, and as the return could be amended in this respect, we pass that point. But it remains that only *property of the respondent* can be attached. The purpose of foreign attachment in admiralty is to secure an appearance. *Manro* v.

Almeida, 10 Wheaton 473. *Seminole Lumber Co.* v. *Bronx Garage Corp.*, 11 Fed. (2) 982 and cases cited. And see historical discussion in *Bremena* v. *Card*, 38 Fed. 144. Appearance has been entered here and answer filed. The vessel is now sought to be held as security for a money claim not yet proven. And she is not claimed by the respondent, but by a third person who is a vendee corporation by act of sale recorded prior to her seizure. If the respondent has any interest in her it must be an equitable one or one arising from unpaid purchase money; and after the lapse of a year no evidence has yet been put into this record that there is any such interest. The vessel when seized was not in the possession or service of respondent, and the burden is surely on libelants to show a justification for her seizure. The present possessor, and apparent owner of title, has a right to a prompt enquiry. Rule 23 of the District Court of the Canal Zone provides for it. It reads in part: "In case of the attachment of property . . . any person having a right to intervene in respect of the thing attached may, upon evidence showing any improper practice or a manifest want of equity on the part of libelant, have an order from the judge requiring libelant to show cause instanter why the . . . attachment should not be vacated."* The motion [fol. 197] made in this case is pursuant to the rule. One of its grounds is in the very words of the rule. The affidavit evidence and the exhibits, while not of the most satisfactory kind, were enough under this rule to require the libelants to show some cause why the vessel should be held as the property of respondents. Neither on the hearing, nor on the rehearing completed September 20, 1948, more than six months after seizure, have libelants proved anything at all to support their contention, alleged on information and belief only, that the vessel is really the property of respondent Compania Maritima. As a sum-

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* Similar rules are stated to exist in the Southern District of New York, the Eastern District of New York, and Northern District of California in 2 Benedict on Admiralty, 6 Ed. p. 399. A claim is stated also to be a proper mode of intervention by a third person whose property may be attached. Id., p. 428.

mary remedy the motion to vacate was properly sustained. There is, however, no adjudication of the title.

3. As to the amended libel against Compania del Caribe, the court concluded that it is without jurisdiction to enter *before judgment for the debt* upon the trial of a creditor's rights in property alleged to have been fraudulently transferred to a third person. The claim *in personam* against Maritima has not yet been established. Admiralty Rule 20 provides for collecting money decrees by execution, but not by such anticipatory proceedings. The jurisdiction is doubtful. The present Rule 20 concludes: "And any other remedies shall be available that may exist under the State or federal law for the enforcement of judgments or decrees." It is probable that after judgment the admiralty court could, like a court of equity, seek out and condemn equitable assets. *Lee* v. *Thompson*, Fed. Cas. 8,202, involved a proceeding after judgment. *Gardner* v. *Dantzler*, 98 Fed. (2) 478, did not adjudicate the equitable title to the ship, the only question being which of two brothers was liable *in personam* for a loss of cargo. Both were held liable. We believe there is no precedent for what was attempted in the libel against Compania del Caribe, before a judgment has been obtained against Compania Maritima. But there is a discretion, as the court held, to refuse enquiry, even if there be jurisdiction, where the case is about [fol. 198] foreign business and the transaction was between foreigners and depends on foreign law, and the witnesses reside abroad.

The authorities on all these points are well discussed in *The Mildmay*, 1932 A. M. C. p. 1396, in which a summary motion under Canal Zone Rule 23 was granted on facts much like those here presented. On the whole we find no error in the judgment complained of and it is, without prejudice to further enquiry into the ownership of the Caribe in the garnishment or on proper proceedings to enforce a judgment *in personam* against Compania Maritima, if obtained,

Affirmed.

McCORD, Circuit Judge, dissenting:

I am forced to the conclusion that my brothers have erred in their statement of the law applicable to this type case. I further believe that they have been unable to visualize and comprehend the far reaching effect and import of their decision. For these reasons, and in order to record a more detailed statement of the essential facts alleged, I have found it necessary to review and set out pertinent portions of the pleadings.

The original libel reveals that respondent, Compania Transmaritima Columbiana, South America, was the owner of two merchant vessels, the CALI and the ALACRAN. The CALI, while delivering a shipment of approximately 30,000 bags of rice belonging to libelants from Ecuador to Cuba, began to leak, and was forced to put into the port of Georgetown, off Grand Cayman Island. There a portion of the rice cargo was discharged, and the remainder either severely damaged, or abandoned in the wrecked hull of the vessel so as to become a total loss. It is alleged that additional damage was done to that portion of the rice removed to the island of Grand Cayman, through the failure of respondent to take precautions against pilferage, and to provide for adequate storage. No portion of the shipment of rice was ever delivered to any of the libelants at their intended ports of destination in Cuba.

In their sup-lemental and amended libel, libelants charge:

> "Since the filing of the original libel herein on March 7, 1948, libelant has learned that respondent Compania Transmaritima Columbiana, S. A., has at- [fol. 199] tempted, on or about March 4, 1948, to divest itself of its property and assets and particularly the Steamship Alacran in fraud of libelants' rights.
> • • •
>
> "Said Compania Colombiana Del Caribe, S. A. was organized by the directors, officers and stockholders of respondent Compania Transmaritima Columbiana, S. A., and no substantial monies were paid into its treasury for the issuance of the stock thereof, if any such stock were actually issued. Compania Colombiana Del Caribe, S. A., is merely the creature or alter ego of Compania Transmaritima Columbiana, S. A., and/or its directors, officers and stockholders. The attempted

transfer of the Steamship Alacran from Compania Transmaritima Columbiana, S. A., to Compania Colombiana Del Caribe, S. A., was not for a real or valid consideration and no real equitable price was paid therefor but, as before alleged, said attempted transfer was wholly fictitious and in an attempt to defraud your libelants of their rights. * * *

"There is no real or actual difference between respondents Compania Transmaritima Columbiana, S. A., and Compania Colombiana Del Caribe, S. A., and before this Court of admiralty of the United States they should be held to be, as they are, one and the same. * * *"

The material portion of the prayer of the amended libel was worded as follows:

"* * * In case said respondents can not be found within this district, then all goods and chattels belonging to them within this district and in particular a certain vessel formerly known as the Alacran, now registered under the name Caribe, now lying in the Panama Canal or within the waters constituting the Pacific entrance to said Canal, within this district, its engines, boilers, tackle and gear of whatever nature or character, may be attached by process of foreign attachment in the amount of Three Hundred Eighty Thousand ($380,000.00) Dollars, the sum sued for in this libel, with interest and costs and disbursements of your libelants. * * *

"Alternatively, that the Steamship Caribe, formerly the Alacran, be attached in the hands of respondent [fol. 200] Compania Colombiana Del Caribe, S. A., as being in reality the goods and effects of respondent Compania Transmaritima Columbiana, S. A. and or as the sole security for the agreed purchase price of said vessel in said purported sale from respondent Compania Transmaritima Columbiana, S. A., to respondent Compania Colombiana Del Caribe, S. A. * * *"

I do not share the conclusion of the majority that jurisdiction in this case is doubtful, but believe the district court had jurisdiction to inquire into the ownership of

the Steamship Caribe, and into the question of whether the alleged fraudulent transfer had effectively passed title to the vessel from respondent to Compania Del Caribe. There is ample authority for the proposition that a court of admiralty has jurisdiction to inquire into the ownership of property attached under its process and into the *bona fides* of a sale of such property by a respondent, even where the purported assignment takes place prior to the attachment. *The J. Edwin Kerwin, Gardner et al.* v. *Dantzler Lumber & Export Co., Inc.*, 98 F. 2d 479; *Chirurg* v. *Knickerbocker Steam Towage Co.*, 174 F. 188; Cf. *Kingston Dry Dock Co.* v. *Lake Champlain Transp. Co.*, 31 F. 2d 265; *The New York*, 113 F. 810, 811; *The Columbia*, 100 F. 890, 893; *The Daisy*, 29 F. 300, 301; *Lee* v. *Thompson, et al.*, Fed Cas. #8,202, 3 Woods 167; *Ward* v. *Peck*, 18 How. 267; *The Tilton*, Fed Cas. #14,054, 5 Mason 465; *Thurber* v. *The Fannie*, Fed. Cas. #14,014, 8 Ben. 429. Even as early as 1878, before this court was created, the Circuit Court of Louisiana, which had substantially the same appellate jurisdiction as this court, laid down the rule thus:

> "The power of the Court (of Admiralty) to entertain such contestations upon all seizures made under its authority would seem to be indispensable. It is as necessary that it should have power to decide between conflicting claims to property seized by attachment or on execution as in seizures upon libels in rem. . . . Without power to try the validity of conflicting claims, the Court could not enforce its judgments for the payment of money. They could always be defeated by fraudulent and simulated transfers. If a third party comes in to claim the property which has been seized, [fol. 201] he must submit himself to the jurisdiction of the Court." Lee v. Thompson, 3 Woods 167.

Thereafter, in the case of *Gardner et al.* v. *Dantzler Lumber & Export Co., Inc.*, 98 F. 2d 478, at p. 479, this court looked through not only the register of a vessel, but also the bill of sale covering its alleged purchase, and in determining the question of its true ownership, Judge Foster observed:

> "All the evidence on the question of ownership of the schooner tended to show that R. C. Gardner was

her owner, except the denial of himself and brother and the deed of sale. This was not conclusive in view of the other evidence. Indeed, the presumption must be indulged that R. C. Gardner put the legal title of the vessel in his insolvent brother to avoid liability for possible claims arising from her operation. Courts of admiralty administer the broadest equity and may look through such transactions to ascertain the truth."

As late as the year 1941, this court recognized that admiralty has jurisdiction of petitory as well as possessory suits in respect of ships or vessels engaged in navigation or commerce, wherein it stated:

> "The jurisdiction actually invoked and exercised is that in admiralty. Admiralty jurisdiction, especially in petitory and possessory suits, exists only in respect of ships or vessels engaged in navigation or commerce, and not over hulks, or vessels that have been permanently taken out of such use. * * *" Kilb v. Menke, 121 F. 2d 1013, 1014.

Not one of the authorities cited by the district court or in the majority opinion establishes anything to the contrary. Cf. *Kingston Dry Dock Co.* vs. *Lake Champlain Transp. Co.*, 31 F. 2d 265; *Yonie Suzuki* vs. *Central Argentine*, 19 F. 2d 645, 27 F. 2d 795-806; *The Ada*, 250 Fed. 194. Moreover, in view of the allegations in both the original and amended libels that Swift & Company Packers, who owned half of the entire cargo of the lost vessel, is a citizen of the United States, and the undisputed fact that all but one of the remaining libelants are citizens of Cuba, I am inclined to the view that the district court had no discretion [fol. 202] to decline jurisdiction. *The Copperfield*, 26 F. 2d 175; *In re Louisville Underwriters*, 134 U. S. 488; Cf. *The Belgenland*, 114 U. S. 355. Even if there be such discretion, the district court clearly abused its discretion in declining to exercise its jurisdiction on a mere summary motion to vacate the attachment, supported only by incompetent and hearsay affidavits and exhibits, when the jurisdictional facts were clearly in dispute. *The Othello*, Fed. Cas. No. 2,483; *Cushing et al.* vs. *Laird*, Fed. Cas. 3,508; *The Circassian*, Fed. Cas. 2,721; *L. Littlejohn & Co., Inc.* vs. *U. S.* 49 F. 2d 467; *Sundquist* vs. *Gray*, 48 F. 2d 638; *The*

Algie, 50 F. 2d 624; *The Senator*, 54 F. 2d 420; Cf. *U. S. vs. Specified Quantities of Intoxicating Liquors et al.*, 7 F. 2d 835; *Charter Shipping Company, Limited*, v. *Bowring, Jones & Tidy, Limited*, 281 U. S. 515.

There was no competent evidence whatever introduced in support of the motion to dismiss and vacate the attachment proceeding, nor was there any substantial conformity or compliance with Admiralty Rule 23, of the Canal Zone District Court Rules.[1] The affidavits and exhibits of respondents' counsel as to the lack of jurisdiction, and particularly as to the validity of the alleged fraudulent transfer under the laws of Colombia, are highly prejudicial and objectionable as self-serving, hearsay declarations, and should never have been considered by the district court. *The Poliscastria*, 11 F. 2d 659; *Avalon-Presidente Wilson*, 1929 A. M. C. 1602; *The Hanna Neilsen*, 25 S. 2d 984. Furthermore, the copy of the vessel's certificate of registry was competent to show only her nationality, and was not conclusive evidence of ownership. *The Navemar*, 303 U. S. 68; *The Kitty C*, 20 F. Supp. 173.

The record reveals that on March 31, 1948, the original motion to vacate the attachment was presented to the dis- [fol. 203] trict judge while on leave from the Canal Zone, and that he overruled same in the following order:

> "After receiving respondents' memorandum, the Court has diligently investigated the law and procedure herein and, after considering the pleadings, exhibits, the motion and memorandum in support of same, has arrived at the conclusion that the motion of respondents cannot be sustained at this time and on this showing."

Thereafter, on September 20, 1948, the original district judge having retired and his successor having finally been

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[1] Rule 23 of the Canal Zone Admiralty District Court Rules, which is quoted by the majority, is clear to the effect that unless competent evidence of either an "improper practice" or a "manifest want of equity" on the part of libelant be shown, the order to show cause why the attachment should not be vacated will not issue. The rule shows clearly on its face that it is not applicable to the instant proceeding.

appointed, and the long delay in the proceedings having been occasioned through no fault of libelants, the new judge issued an opinion in which he refused to entertain jurisdiction of the cause, whereupon the libels were dismissed and the attachment vacated. Since the original judge in the above ruling had already considered the question of declining jurisdiction, *as a matter of discretion*, libelants were entitled to rely upon his ruling, and the question of whether he properly exercised his discretion on the original motion was hardly open for review or further consideration by his successor in office. In any event, the case should not go off on the question of discretion; for the reason that the libel is filed principally on behalf of a citizen of the United States, and it is the unquestionable legal right of such citizen to bring an action in the courts of its own country. Furthermore, the original respondent which entered into this contract of carriage availed itself of the statutes of the United States in the contract itself,[2] and both respondents use the territory and waters of the United States, including the Canal Zone, to carry out their contracts of affreightment. [fol.204] It further appears from the bills of lading that half of the rice cargo was designated and marked as the property of "Swift & Company", and thus the carrier knew, or should have known, that it was dealing with a citizen of the United States, as the ultimate owner of fifty per-cent of the entire cargo of the vessel. It makes no difference that libelants severally bought interests in the rice cargo while in transit, as they were nevertheless entitled to safe delivery of their respective property.

There is no merit whatever in the contention that the judgment of the district court is not final or appealable. It becomes manifest that if the holding that no maritime liability is asserted against Compania Del Caribe or the vessel Caribe is permitted to stand, that these libelants will

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[2] There is an endorsement on the contract of affreightment as follows:

"This bill of lading shall have effect subject to the carriage of goods by Sea Act of the U. S. A. and the carrier and the ship shall be entitled to all of the rights and immunities set forth in said Act. To the extent that any term of this bill of lading is repugnant to or inconsistent with anything in such Act, it shall be void. • • • "

be denied all effective and substantial relief. A personal judgment against a foreign corporation rendered by a Federal Court, where there is no security under court attachment, is practically worthless, for there would be no process enforceable against it. Our jurisprudence is practically uniform to the effect that courts will view the substance and effect of an order, to determine whether it is final and of an appealable nature, rather than the mere form in which it is rendered. *The Pesaro*, 255 U. S. 216; *Baltimore & Ohio R. R. Co. v. United Fuel Gas Co. et al.*, 154 F. 2d 545; *The Panaghia Kathariotisa*, 165 F. 2d 430; *Rosenberg Bros. & Co. v. Curtis Brown Co.*, 260 U. S. 516; *The Attualita*, 238 Fed. 909.

I take issue with the statement of the majority that "* * * Neither on the hearing, nor on the rehearing completed September 20, 1948, more than six months after seizure, have libelants proved anything at all to support their contention alleged on information and belief only, that the vessel is really the property of respondents. * * *" Evidently, they ignore the fact that libelants introduced portions of the records in libel proceedings pending in two other district courts of the United States, which in some sort reveal that Walter W. Keene, one of the principal stockholders, and director and manager of both respondent corporations insured the lost M/V CALI not in the name of Compania Transmaritima, her supposed owner, but in his own name; that he personally collected the insurance thereon and presumably kept the proceeds, and otherwise treated both these Latin American Corporations as his personal chattels.[3] This testimony of disinterested parties in [fol. 205] other proceedings in the Federal courts of the United States strongly tends to show some connection between the two respondents, and sheds considerable doubt on the good faith of the alleged transfer.[3] Moreover, having charged a fraudulent transfer in their supplemental

[3] These other proceedings are apparently not reported, but pertinent excerpts therefrom have been included in the record. They are entitled, "Swift & Company, Packers, et al. vs. Compania Transmaritima Colombiana, S. A., et al", in the United States District Court for the Southern District of New York, and "Swift & Company, Packers, et al. vs. Walter W. Keene, et al.", in the District Court of the United States for the Southern District of Texas.

libel, it was not incumbent upon libelants to prove their case by their pleadings, Rule 23 notwithstanding, but they were entitled to be heard upon the merits.[4]

Evidently, in relegating this case to the Colombian courts for trial, the majority has not considered the possibility that libelants may, by virtue of this decision, be precluded from obtaining the relief sought in that jurisdiction, as well as here. The record reveals that the district court, in granting respondents' motion to vacate this attachment, received into evidence and considered the "opinion" of one Ascanio Mulford, a Panama attorney who is alleged by respondents to have expert knowledge of the laws of Colombia, that the transfer of the vessel Caribe was not fraudulent under the laws of that country. Since Mulford was obviously an attorney paid by respondents, his "opinion" was not competent evidence of foreign law, and should never have been considered by the Court. *The Poliscastria*, 11 F. 2d 659; *Avalon-President Wilson*, 1929 A. M. C. 1602.

The supplemental and amended libel here charges in no uncertain terms gross fraud, and the district court, by resorting to the convenient expedient of declining to exercise its admiralty jurisdiction, has sent these libelants hence in a summary fashion without their day in court, and remanded them to a doubtful remedy in a foreign jurisdiction. The import of this decision, as precedent, appears to be that when foreign ship owners are about to be hailed [fol. 206] into our courts to answer for their negligence they may escape liability by a fraudulent transfer and sale of their vessels in a foreign jurisdiction,[5] and thereby effectively oust our Federal courts of admiralty jurisdiction in attachment proceedings. They would thus be permitted to

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[4] This is particularly true in view of the incompetent type of proof offered by respondents in support of their motion to vacate the attachment, which the majority admits, is "not of the most satisfactory kind."

[5] It should be remembered that for the purpose of considering the district court ruling on the motion to vacate the attachment, the allegations contained in the libel must be accepted as true. Benevento v. U. S. et al., 68 Fed. Supp. 347; The Illapel, Harry Schnell et al. vs. U. S., 1946 A. M. C. 1499; The Vema, 27 Fed. Supp. 679; Sundquist vs. Gray, 48 F. 2d 638.

profit from their own wrong, and their vessels would be allowed to continue using our waters and the Canal Zone locks with impunity. I cannot subscribe to any such doctrine.

I conclude that on the record here presented there is no legal basis for the action of the district court in dismissing the libel against the respondent Compania Del Caribe, and vacating the attachment against the vessel Caribe. The case should be reversed and remanded for a hearing on the charges as contained in the libel.

I respectfully

Dissent.

JUDGMENT

Extract from the Minutes of May 30th, 1949

No. 12608

SWIFT AND COMPANY PACKERS, ET AL,

versus

COMPANIA COLOMBIANA DEL CARIBE, S. A.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Canal Zone, and was argued by counsel;

On consideration whereof, It is now here ordered, adjudged and decreed by this Court that the judgment of the said District Court in this cause be, and the same is hereby affirmed, without prejudice to further enquiry into the ownership of the Caribe in the garnishment or on proper [fol. 207] proceedings to enforce a judgment in personam against Compania Maritima, if obtained;

It is further ordered, adjudged and decreed that the appellants, Swift and Company, Packers, and others and the surety on the appeal bond herein, United States Fidelity and Guaranty Company, be condemned, in solido, to pay the costs of this cause in this Court, for which execution may be issued out of the said District Court.

"McCord, Circuit Judge Dissents."

[fol. 208] PETITION FOR REHEARING—Filed June 17, 1949
1949

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 12,608

SWIFT & COMPANY PACKERS, et al., Appellants,

versus

COMPANIA COLOMBIANA DEL CARIBE, S. A., Appellee

PETITION FOR REHEARING

To the Honorable the Judges of the United States Court of Appeals for the Fifth Circuit:

The petition of Swift & Company Packers, et al., appellants, for a rehearing, with respect represents:

I

The Court Erred in Holding that the Attachment of the Caribe May Be Vacated Without Adjudicating the Title to the Vessel.

II

The Court Erred in Holding that the Affidavit Evidence and the Exhibits Attached Thereto Were Enough, Under Rule 23 of the District Court of the Canal Zone, [fol. 209] to Require Libelants to Show Some Cause Why the Vessel Should Be Held as the Property of Respondent Compania Transmaritima Colombiana, S. A.

III

The Court Erred in Holding, as a Fact That the Case Presented involves a Transaction Between Foreigners and That, Therefore, the Court Below Had Discretion to Refuse Enquiry Into the Suit Against Compania Colombiana Del Caribe.

IV

The Court Should Clarify and Amplify Its Holding That Libelants Are Entitled to Further Enquiry Into the Ownership of the Caribe in the Garnishment.

Wherefore petitioners pray that they be granted a rehearing herein.

Harry F. Stiles, Jr., of Deutsch, Kerrigan & Stiles, Proctors for Petitioners-Appellants.

CERTIFICATE

I certify that the foregoing petition for rehearing is filed in good faith and not for the purpose of delay.

Harry F. Stiles, Jr.

[fol. 210] UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 12,608

SWIFT & COMPANY PACKERS, et al., Appellants,

versus

COMPANIA COLOMBIANA DEL CARIBE, S. A., Appellee

BRIEF IN SUPPORT OF PETITION FOR REHEARING FILED ON BEHALF OF APPELLANTS

I

The Court Erred in Holding That the Attachment of the Caribe May Be Vacated Without Adjudicating the Title to the Vessel.

The basic proposition advanced in the libel and in the amended and supplemental libel is that the Steamship CARIBE is the property of respondent TRANSMARITIMA.

[fol. 211] The original libel concluded with the prayer that "In case said respondent (Transmaritima) cannot be found within this District, then all goods and chattels belonging to it within this District, and in particular a certain vessel known as the ALACRAN or the CARIBE * * * may be attached by process of foreign attachment * * *".[1]

The supplemental libel alleged that TRANSMARITIMA had "*attempted* * * * to divest itself of the Steamship

[1] R. 12. Parenthesis ours.

• • • "; that no real consideration was paid for the "*attempted*" transfer; that said "*attempted*" transfer was wholly fictitious.[2]

Therefore it is inescapable that, according to the allegations of the libel and the amended libel, the Steamship "Caribe" is the property of TRANSMARITIMA.

The vessel having been attached as the property of TRANSMARITIMA, that attachment cannot be dissolved or released by the mere appearance of the respondent. Other than by a proceeding strictly in accordance with District Court Rule 23, it may only be released or vacated in one of three ways: (a) by the posting of a bond in accordance with Supreme Court Admiralty Rule 5, (b) by showing on admissible and adequate evidence that respondent was present within the district at the time of seizure, (c) by the production of admissible and adequate evidence that the vessel was the property of some one other than respondent.

No bond has been posted for the release of the vessel. [fol. 212] No showing and, in fact, no contention has been made that either of respondents were within the district at the time of the attachment.

What respondents did in this case was to propose to the court below that the vessel was owned by respondent CARIBE and not by respondent TRANSMARITIMA and that, solely on the basis of such suggested *ownership*, the attachment should be vacated.

Thus, in order to decide the motion, the court below, of *necessity*, had to adjudicate the title to the vessel. That is exactly what the court below did. In its first opinion under the heading of "Findings of Fact" it held:

> "• • • it must be held that the vessel Caribe • • • was • • • at the time of such levy the property of the incorporated respondent Compania Colombiana Del Caribe, and *by reason thereof* the levy of attachment on the vessel Caribe is hereby discharged and such vessel released therefrom."[3]

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[2] R. 24, 25. Italics ours.

[3] R. 12. Italics ours.

Again, in its second opinion the court below held:

> "Both the pleading and exhibits establish that title to the vessel Caribe had passed to the 'corporation Caribe' "[4]

It was primarily from this holding that an appeal was prosecuted to this court. Error was specifically assigned to this holding.[5]

[fol. 213] Only on such a holding may the vacating of the attachment be justified. The issue of title to the "Caribe" is not determined by this court, as the majority has unequivocably held, saying:

> "There is, however, no adjudication of title".[6]

How, then may the court vacate the attachment of the "Caribe" which was levied on that vessel as the property of respondent TRANSMARITIMA.

It must be concluded that the majority was of the opinion that an inadequate and insufficient showing of where the title to the vessel lay had been made by respondents and that, on the basis of the showing so made, it could not be held that title to the Steamship "Caribe" was in respondent corporation CARIBE.

This being so, the order of the district court vacating the attachment of the vessel should be reversed since the order was, and had to be, predicated on an adjudication of the title to the vessel.

II

The Court Erred In Holding That the Affidavit Evidence and the Exhibits Attached Thereto Were Enough, Under Rule 23 of the District Court of the Canal Zone, To Require Libelants To Show Some Cause Why the Vessel Should Be Held As the Property of Respondent Compania Transmaritima Colombiana, S. A.

The procedure taken by respondents was not pursuant to Rule 23 of the District Court.

[fol. 214] No evidence, by affidavit or otherwise, was offered to the court to show "any improper practice or manifest want of equity on the part of libelant".

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[4] R. 164.

[5] R. 182. Assignment of Error No. 5.

[6] Opinion, Page 7.

No request was made by respondents for an order from the judge requiring libelant to show cause why the attachment should not be vacated.

No such order nor any order of any kind directing libelants to show cause was obtained.

Again we reiterate that the motion of respondents was not predicated on any "improper practice or manifest want of equity on the part of libelant" within the meaning of those words as embodied in district Rule 23, but was predicated on the proposition that title to the "Caribe" was in corporation CARIBE and not in TRANSMARITIMA. That issue, libelants were willing to meet on the record as then made up since the evidence offered by the proponent of the motion consisted solely of hearsay affidavits of proctor Ramirez and exhibits attached thereto. In addition to the cases cited by libelant in its brief in support of its position on this phase of the matter and the careful analysis of the law set forth by Judge McCord, it might be well to call the court's attention at this time to Rule 56(e) of the Federal Rules of Civil Procedure which provides:

> "Supporting * * * affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence and shall show affirmatively that the affiant is competent to testify to the matters stated therein."

[fol. 215] In view of the above quoted rule it has been universally held that affidavits based on hearsay must be *disregarded* by the court.[7]

While we are well aware that the rules of civil procedure do not, of themselves, apply to admiralty procedure, nevertheless the admiralty courts of the United States have

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[7] Walling vs Fairmont Creamery Co., 139 F (2d) 318, 7 Fed. Rules Serv. 800 (CCA 8—1943); Associates Discount Corp. vs Crow, 2 Fed Rules Serv. 540 (App. D. C.—1940); Hummel vs Wells Petroleum Co., 111 F (2d) 883 (CCA 7—1940); Seward vs Nissen, 6 Fed. Rules Serv. 614 (DC Del.—1942); Edward B. Marks Music Corp. vs Stasny Music Corp., 4 Fed. Rules Serv. 773 (SD NY—1941); Securities and Exchange Commission vs Payne, 35 FS 873 (SD NY—1940); Fox vs Johnson & Wimsatt, 2 Fed. Rules Serv. 542 (DC DC—1940); Boerner vs United States, 26 FS 769 (ED NY—1939).

looked to the civil rules on many occasions for guidance in matters of this sort. Moreover, admiralty courts have consistently frowned upon replications, motions to quash, motions to strike and the technical legal maneuverings which were prevalent under the common law procedures. Serious objection was raised to the hearsay affidavit of Ramirez in open court, so much so that in his second opinion the judge *a qua* finally decided to disregard it and endeavor to pitch his decision on the first affidavit of March 15, 1948, which was, as this court has declared it to be, "mainly a legal argument".

It should be borne in mind, too, that, at that stage of the proceedings, not only was the evidence offered either inadmissible or of no value but the lack of evidence which was readily available to respondents was an equally significant factor. Thus, respondent CARIBE, in effect,[8] refused to state on oath of one of its officers or directors when and where it was incorporated, how many shares of its [fol. 216] capital stock were issued, the names of the holders of same and the amount paid for same, what the real and actual terms governing the pretended sale of the vessel from TRANSMARITIMA to CARIBE were and what the real relation of the two corporations actually was. Moreover, though it is stated in the hearsay affidavit of proctor Ramirez dated August 16, 1948, that the vessel was sold and transferred from one corporation to the other "on or about" February 25, 1948, the "instrument effecting" such sale and transfer was not produced in evidence even though the affidavit represents that it was "granted" before the Consul General of Colombia in Panama, R. P. and therefore was readily obtainable by respondents.

At all events, this court has substantiated libelants' judgment in approaching the matter thus by holding, in effect, that the proctor's affidavit was not sufficient to show title in corporation CARIBE.

We earnestly urge that the matter should have rested there so far as this appeal is concerned and the trial of the case should have proceeded with the "Caribe" remaining under attachment until good and sufficient evidence to establish title to the vessel had been introduced.

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[8] By exceptions and objections to interrogatories, R. 85, 86.

But this court has gone further and held that though the affidavit did not show title in corporation CARIBE it was enough to require libelants to show that title was in TRANSMARITIMA. This is believed to be manifest error. If the affidavit were insufficient to support CARIBE's claim to title, then the motion to vacate must fail for the ground on which [fol. 217] it was based is not solid and the evidence offered is not sufficient for the granting of the relief prayed for. It would seem inconceivable that evidence insufficient to support a motion for affirmative relief should, nevertheless, be sufficient to shift the burden of producing evidence on the subject to the defendant in the motion. To put it another way, if the affidavit is not good to show title in respondent CARIBE then it is not good for anything. Evidence cannot be "half good".

The dubious value of a proctor's admittedly hearsay affidavit has been so effectively destroyed as a matter of law by Judge McCord in the dissent herein that further argument on the legal aspect of it would serve no useful purpose.

There is, however, additional factual information bearing on the value and significance of the proctor's affidavit. Since the decision of this court was filed, our attention has been called to an unreported proceeding in the United States District Court for the District of the Canal Zone entitled "In the matter of CHARLES E. RAMIREZ" being No. 1705 of the Civil Docket of that court. It is with some reluctance that we now direct the attention of the court to this proceeding. However, in view of the legal significance attached to the affidavit by this court, we feel that we would be derelict in our duty to our clients were we to fail to do so. The proceeding referred to was instituted by the court[9] on the recommendation of the Bar Association of the Canal Zone, that Mr. Ramirez be ordered to show cause why he should not be disciplined. The judge [fol. 218] in reaching a decision which resulted in a six months' suspension of Mr. Ramirez said:

"A tedious, painstaking, careful and fair consideration of the record herein, however, convinces the court

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[9] Hon. Bunk Gardner, United States District Judge, who was the same judge who overruled the first motion to vacate in the instant case.

that the respondent's conduct as shown by this record is not consistent with innocence and good faith, and if the court should assume, without deciding, that every statement of Harrison's about the respondent's knowledge of what was going on was untrue, and, further, that the respondent was not conscious of any wrongdoing, it is still confronted with a situation where the evidence, uncontroverted, irrefutable, inevitable and irresistible, shows that the respondent has no conception of his obligations, responsibilities and duties to the court or to his profession."

It is not our purpose to open an old wound nor are we prompted by any personal animosity toward Mr. Ramirez. But Mr. Ramirez has voluntarily proffered himself as a witness in the instant case and, though his evidence is admittedly based on what some one else told him, his credibility is open to attack.

In the light of the above quoted holding of Judge Gardner, it is believed that the last vestige of evidentiary value is torn from the proctor's affidavit and that the matters stated therein are not enough to have required libelant to show cause why the "Caribe" should be held under attachment as the property of respondent TRANSMARITIMA.

[fol. 219] III

The Court Erred in Holding, as a Fact, That the Case Presented Involves A Transaction Between Foreigners and That, Therefore, the Court Below had Discretion To Refuse Enquiry Into the Suit against Compania Colombiana Del Caribe.

It can only be assumed that by this holding the court has segregated the alleged transactions, whatever they may have been, between TRANSMARITIMA and CARIBE from the suit brought by libelants for loss of and damage to their cargo. It is thought that this may not be done.

Viewed in its essence this action is brought by a citizen of the United States [10] and certain foreign corporations,

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[10] Swift & Company, Packers, a corporation organized under the laws of the State of Nevada, and so recognized by the Court, Page 1 of the opinion.

partnerships and individuals, all libelants against two foreign respondents. Jurisdiction of respondents was obtained by writs of foreign attachment. The prime allegation in libelants' pleadings is that the vessel attached was the property of respondent TRANSMARITIMA; in the alternative, that if it were held to be the property of CARIBE, then that such transfer from one respondent to the other was a nefarious and fraudulent scheme perpetrated for the purpose of defeating the rights of libelant, and that the respondent CARIBE was liable as the *alter ego* of TRANSMARITIMA.

Even if it were decided, though this court has very properly refused to so hold on the present record, that the trans- [fol. 220] fer of the vessel was completed so as to give respondent CARIBE title to it, the suit would remain as an action by a United States citizen and others against a foreigner and the court would have no discretion to decline jurisdiction. The law on this point has been uniform, includes a decision by the Supreme Court of the United States and is correctly set forth by Judge McCord on page 14 of the decision. Other than the instant decision, we know of no case to the contrary, nor is any case cited by the majority.

The mere fact that the case involves a purported transaction by respondents among themselves as an incident to the main action could not conceivably destroy jurisdiction as between libelants and respondents.

It is unthinkable that a citizen of the United States should be deprived of the right to resort to the courts of his own country only because in the development of the proof of his contentions enquiry must be had into certain dealings had by two foreign respondents among themselves.

Granting, *arguendo*, that such a legally impossible situation is so, then the question arises, how often may a court consider the question of whether or not it will, in its discretion, decline to exercise jurisdiction, which it undeniably has. The answer suggests itself that this should be limited to one occasion. Here the court was requested to decline jurisdiction by respondents' motion of March 15, 1948,[11] and special appearance of March 24, 1948[12] and

[11] R. 39, 40, 41.
[12] R. 68, 69.

refused to do so.[13] We do not think, in the absence of abuse, which is not alleged or contended for that the right [fol. 221] to decline as *a matter of discretion*, survived the ruling of the court on the specific point.

IV

The Court Should Clarify and Amplify the Holding That Libelants are Entitled to Further Enquiry Into the Ownership of the Caribe in the Garnishment.

Since the title to the Steamship "Caribe" is not adjudicated by this Court and implicitly the adjudication of title by the District Court is reversed a serious question arises as to the disposition of the vessel in the garnishment proceedings.

It may well be that further enquiry into the ownership in the garnishment will develop that the vessel is in reality the property of respondent, TRANSMARITIMA. Libelants earnestly believe that such will prove to be the case.

However, if, pending further proceedings in the garnishment, the garnishee is permitted to remove the vessel, title to which is still in dispute, out of the jurisdiction of the District of the Canal Zone, libelants will be left without a remedy in the event they ultimately prevail.

Under these circumstances, and since title to the vessel is not adjudicated, should a rehearing be refused on the first three points of the petition herein, the decree of this court should be amplified to direct that the vessel should be delivered to the garnishee only upon the garnishee furnishing bond in an amount equivalent to the value of the vessel, conditioned that it will abide—all orders and decrees which may be rendered against it as garnishee. [fol. 222] Only in this way can the substantive and as yet undetermined rights of libelants be protected.

CONCLUSION

It is urged that the attachment of the "Caribe" as the property of TRANSMARITIMA may not be vacated without adjudicating title to the vessel; that respondents did not proceed in this case under District Rule 23; that the affidavit and exhibits offered by respondents were in-

[13] Order of Judge Gardner—R. 70, 71, 72.

admissible and incompetent and in no event were sufficient to place on libelants the burden of proving, before trial, that the vessel seized was the property of TRANSMARITIMA; that as a matter of fact the case is not one between foreigners and therefore the court below had no discretion to decline to take jurisdiction.

Under any circumstances the vessel should not be delivered to the garnishee unless and until the garnishee should post a bond for her value.

It is further urged that a rehearing should be granted and the decree of the District Court should be reversed and the attachment maintained.

Harry F. Stiles, Jr., Proctor for Appellants.

Of Counsel: Deutsch, Kerrigan & Stiles.

[fol. 223] This is to certify that copies of this Brief have been served on opposing counsel, by placing same in the United States mail this — day of June, 1949.

[fol. 224] Opinion on Rehearing and Dissenting Opinion By McCord, Circuit Judge, Filed July 20, 1949.

IN THE UNITED STATES COURT OF APPEALS, FOR THE FIFTH CIRCUIT

No. 12608

SWIFT & COMPANY, PACKERS, ET AL., Appellants

versus

COMPANIA COLOMBIANA DEL CARIBE S. A. Appellee

Appeal from the District Court of the Canal Zone

ON PETITION FOR REHEARING—July 20, 1949

Before Sibley, McCord, and Waller, Circuit Judges.

SIBLEY, Circuit Judge: As to the points urged in the motion for rehearing, it is our view that the process in foreign attachment is issued to secure an appearance in a libel *in personam*, and if there is no appearance to sequestrate property against which a decree may be enforced if obtained. It is not like a libel *in rem* to enforce a maritime

lien against the property seized. The property here attached was not in the possession or service of the respondent in the libel *in personam*, and there is no presumption that it was property of the respondent. There can be no greater "want of equity" than to attach the property of another for the *in personam* debt of the respondent, and Canal Zone Rule 23 provides a summary remedy to obtain release. The Rule was quoted in one of the grounds of the motion for release. It is true no rule *nisi* was issued against the libelant to show cause, but the motion was entertained and notice given, and three full hearings had. No one objected to the absence of a rule. We have held the evidence was not such, and the proceeding was not such, as to warrant an adjudication of title to the seized ship, and that there was no adjudication of its title, but that the district court was warranted in declining to hold the ship further with no evidence whatever produced by the libelant that she was the property of respondent.

[fol. 225] We have not held that the libel *in personam* was wholly between foreigners, and that jurisdiction over it might be for that reason declined. Jurisdiction has not been declined, but retained. We held only that the question of the organization of the corporation Caribe and its relationship to the corporation Transmaritima, and its liability for the latter's debts, involved transactions in the Republic of Colombia and under its laws, with the witnesses and evidence located there, and that the supplementary libel *in personam* against Caribe might be dismissed for that reason.

As to the garnishment of Caribe, which was sustained, it has been held that a vessel of a respondent is property which may be reached by garnishment if in the possession of a garnishee. The release of the vessel from attachment does not adjudicate any question that may arise about her under the garnishment. Such questions must await the answer of the garnishee, and there is no right to seize property sought to be reached by garnishment sooner; probably not till final decree establishing the *in personam* liability of the respondent.

We see nothing to be gained by further argument, and the motion for rehearing is

Denied,

McCORD, Circuit Judge, dissenting:

I am more than ever convinced that a rehearing should be granted, and that this case should be reversed for a full and fair hearing on the charges contained in the amended libel. Throughout this proceeding, my brothers have evidently forgotten the admonition of our elders that Admiralty should act as a court of Equity, and that fraud, from time immemorial unlocked the doors of justice to whenever sufficiently charged, is a master-key which has every aggrieved citizen in the world. For all its seeming wisdom and learned discourse on the law, the majority opinion again manifests a persistent tendency to by-pass these fundamental concepts of right and justice.

The majority here reiterate their view that the process in foreign attachment was issued merely to secure an appearance in the libel proceeding, and that the vessel ought not to remain under attachment after the respondent Caribe has appeared and answered, claiming the vessel as its own. Apparently they ignore the basic proposition ad- [fol. 226] vanced in the libel that the steamship Caribe is in reality the property of Transmaritima; that the vessel was attached as the property of Transmaritima; and that in spite of the *attempted* and *fictitious transfer* there is "* * * *no real or actual difference between respondents* Compania Transmaritima Columbiana, S. A., and Compania Colombiana Del Caribe, S. A., and before this Court of Admiralty of the United States they should be held to be, as they are, *one and the same.* * * *".* They further ignored the fact that an *in personam* decree against Compania Transmaritima would be utterly worthless and unenforceable even if obtained, for this respondent since the date of the attachment has claimed no interest in the vessel, and this court has in effect held that it has no such interest. Thus, while the majority concede the libel is sufficient *in personam* against Compania Transmaritima, they nevertheless deny libelants the security of the vessel under court attachment as against the respondent Caribe, this in spite of the fact that both corporations are alleged to be identical and the purported transfer wholly fictitious and fraudulent. Moreover, it is without dispute that the steamship Caribe is the only property within the jurisdiction of the court against which a decree would be enforceable. I therefore seriously doubt whether these libelants.

who claim to have suffered damages from the loss of their cargo running into the hundreds of thousands of dollars, will ever be justly and adequately compensated by the hollow victory of an *in personam* judgment against Compania Transmaritima, when that respondent has been held to have no interest in the only security under attachment. Evidently, this is just another way of acknowledging the existence of a right without providing for any effective remedy or relief. I have never favored such decisions, which seem to glorify technicalities or form at the expense of the substance of a right.

I must further take issue with the following statement by the majority:

> "The property here attached was not in the possession or service of the respondent in the libel in personam, and there is no presumption that it was property of the respondent. There can be no greater 'want of equity' than to attach the property of another for the in personam debt of the respondent • • • " (Italics mine.)

[fol. 227] Although the majority claim there has been no adjudication of the title to the seized vessel, and admit that the evidence and hearing was not such as would warrant an inquiry into its true ownership, it nevertheless becomes patent from the above holding that their decision is predicated on the theory that the respondent Caribe is the true owner of the vessel, and that the charges as to the fraudulent transfer and identity of the two corporations are wholly without legal substance and effect. They are actually deciding the case on its merits adversely to libelants without according them the hearing to which they are entitled. Weak excuse to justify this persistent refusal to grant libelants a hearing is made on the ground that they have thus far introduced no evidence to show the vessel is actually the property of respondent Transmaritima. I do not believe it fair or just to thus penalize libelants as derelict in failing to prove their case in the pleadings under the District Court Rules before they have had a reasonable opportunity to do so by testimony at a fair hearing. In the present state of this record, no one can truthfully say whether libelants are entitled to relief against anyone, but surely they are entitled to be heard.

The majority, however, claim they are not, and I must confess that the more they explain their position, the more I don't understand it.

To my way of thinking this is an important case, and the issues here decided will touch the business life of our Republic in a vital way. I believe the majority decision is wrong. It seems to me it fails to answer this one vital question in the case: The amended libel charges fraud, and alleges that both these foreign corporations are *one and the same;* that the respondent Caribe has by means of the fictitious and fraudulent transfer taken over the ship that rides at anchor in the Canal Zone; that shortly after the loss of libelants' rice cargo and just before the attachment of this vessel, in an effort to escape liability for their negligence, respondents executed such fraudulent transfer as a subterfuge designed to defraud libelants of their rights. These charges have never been answered, and under the majority decision they will never be answered, for no hearing can be held on them.

I Dissent.

[fol. 228] ORDER DENYING REHEARING

Extract from the Minutes of July 20, 1949

No. 12608

SWIFT AND COMPANY, PACKERS, ET AL

versus

COMPANIA COLOMBIANA DEL CARIBE, S. A.

It is ordered by the Court that the petition for rehearing filed in this cause be, and the same is hereby, denied.

"McCord, Circuit Judge, dissents."

Clerk's Certificate to foregoing transcript omitted in printing.

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AUG 2 1949
CHARLES ELMORE CROPLEY

Supreme Court of the United States

OCTOBER TERM, 1949

No. 230

SWIFT & COMPANY PACKERS, et al.,
Petitioners and Appellants Below,

versus

COMPANIA COLOMBIANA DEL CARIBE, SA.,
Respondent and Appellee Below.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

EBERHARD P. DEUTSCH
and
HARRY F. STILES, JR.,
Proctors for Petitioners.

DEUTSCH, KERRIGAN & STILES,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1949

No. .....

SWIFT & COMPANY PACKERS, et al.,
Petitioners and Appellants Below,

versus

COMPANIA COLOMBIANA DEL CARIBE, SA.,
Respondent and Appellee Below.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully shows:

I

Questions Presented.

The important questions of law presented for determination in this proceeding are:

1. Has a district court of the United States, sitting in admiralty, discretion to decline jurisdiction of a proceed-

ing instituted by a citizen of the United States and others, against foreign respondents, for loss of cargo shipped between foreign ports under bills of lading expressly made subject to the Carriage of Goods By Sea Act of the United States?

2. Is the question as to whether a district judge of the United States, prior to his retirement, properly refused to decline discretionary jurisdiction of a proceeding in admiralty, open to review by his successor in office?

3. Has not a district court of the United States, sitting in admiralty, jurisdiction to determine for itself whether a vessel seized under process of foreign attachment is actually the property of a foreign respondent?

4. Does a mere proctor's affidavit on information and belief, to the effect that a vessel seized under process of foreign attachment is not owned by the respondent, filed in an admiralty proceeding in a district court of the United States in support of a motion to dismiss and vacate the attachment for want of jurisdiction of the court, place on the libelant the burden of showing why the vessel should be held and jurisdiction maintained; or should not jurisdiction be determined only after hearing of disputed facts on competent testimony?

II

Summary Statement of Matter Involved

The proceeding under review was instituted originally by libel in admiralty for loss during late January, 1948,

of a cargo of rice from the Motor Vessel CALI, which foundered while en route from Ecuador to Cuba. Half of the cargo was owned by Swift & Company Packers, a Nevada corporation, and the remainder by citizens of Cuba, except for one consignment owned by a Columbian.[1]

The Motor Vessel CALI was owned by Compania Transmaritima Colombiana, a Colombian corporation, hereinafter simply called Transmaritima. This company also owned another vessel called the ALACRAN. Libel was filed in behalf of Swift & Company and the other cargo owners, (each for its own interest), on March 7, 1948, in the District Court of the Canal Zone, against Transmaritima, jurisdiction being sought by attachment of the ALACRAN.[2]

The vessel was attached by the marshal on March 8,[3] and on the same day a supplemental and amended libel was filed, alleging that libelants had just learned that an attempt had been made, on or about March 4, 1948, to transfer the Steamship ALACRAN, renamed CARIBE, to a Colombian corporation just formed by the beneficial owners of Transmaritima, in anticipation of the assertion, and in fraud, of libelants' rights. This new corporation was Compania Colombiana Del Caribe, hereinafter simply called Caribe.[4]

It was further alleged that the attempted transfer of the vessel was fictitious, that the two companies were

[1] Libel, R 3 et seq. The shipments were all made under bills of lading expressly claused to be subject to the Carriage of Goods by Sea Act of the United States.
[2] Ibid.
[3] R 18-21.
[4] R 23 et seq.

actually one, and that Caribe was in fact the *alter ego* of Transmaritima. The amended libel prayed for attachment of the vessel in the hands of both companies, or in the hands of Caribe as in fact the property of Transmaritima or as security for the alleged purchase price in the purported act of sale.[5] To this supplemental libel, were annexed searching interrogatories, requiring Caribe to state under oath, all of the facts surrounding formation of that company, and the purported transfer of the vessel to it.[6]

The vessel was again attached by the marshal.[7] On March 15, the master of the vessel claimed her as property of Caribe,[8] and that company moved to dismiss the libel and vacate the attachment of the vessel on the grounds that the action was between foreigners, that the alleged fraudulent transfer of the vessel raised issues which ought to be decided only in Colombia, and that "no sufficient cause has been alleged why this court should hear this matter".[9]

Attached to this motion, was a document denominated an affidavit, executed by proctor for Transmaritima and Caribe, setting forth his argument in support of his motion,[10] annexing a copy of the "certificate of registry" of the vessel with the Colombian Consul in Panama on

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[5] Ibid.
[6] R 29-31. These interrogatories have never been answered (See post.).
[7] R 32-34.
[8] R 36-38.
[9] R 39-41.
[10] R 41-49. "On the same day the new company by its proctors made a motion, supported by an affidavit which is mainly a legal argument . . ." Opinion of Court of Appeals, p. 8.

March 4,[11] and the opinion of a Colombian lawyer that "the courts of justice of the Canal Zone completely lack jurisdiction" to decide the claim against Transmaritima and Caribe.[12]

On March 31, the judge of the district court overruled the motion to dismiss the libel and vacate the attachment, and refused to decline jurisdiction.[13] The district judge retired on the following day,[14] and none was appointed until later.[15]

On June 11, 1948, answers to the libel, as amended, were filed in behalf of both respondents.[16] Transmaritima's answer pleads in defense certain provisions of the Carriage of Goods Act of the United States,[17] and "invokes the benefit of the provisions of the Revised Statutes of the United States . . . in limitation of the liability of shipowners." [18]

Respondent Caribe, with its answer, filed exceptions to libelant's interrogatories which sought sworn information as to the formation of Caribe and the circumstances surrounding transfer of the vessel.[19]

On August 16, 1948, proctor for respondents again moved to dismiss the libel and vacate the attachment on

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[11] R 59-61. Such a certificate is not evidence of title or ownership. The Navemar, 303 US 68, 73.
[12] R 62-67.
[13] R 70-72.
[14] 75 F. Supp. x.
[15] 77 F. Supp. x.
[16] R 74-81.
[17] 49 Stat. 1207-13, 46 USC 1300-15.
[18] 27 Stat. 445, 46 USC 192.
[19] R 85-86.

substantially the same grounds as theretofore urged and overruled, with the added suggestion that the district court, sitting in admiralty, was without jurisdiction to determine the validity of the transfer of the vessel.[20]

In support of this renewed motion, proctor for respondents submitted another document in the form of an affidavit by himself, on information and belief, expanding somewhat on his prior statement, and alleging that the controlling interests in the two corporations are substantially different, although showing that Walter W. Keene and Eulogio Echaverri, stated to be managing director and "sub-manager" respectively of both companies, owned 51 out of 100 shares of Transmaritima, and 47 out of 50 shares of Caribe. This document also called attention to other proceedings on the same causes of action instituted by libelants in New York and Texas against the same respondents and against Keene as effective owner of both.[21]

On September 20, 1948, the new district judge upheld the motion to dismiss the libel and vacate the attachment, holding that he was without jurisdiction, sitting in admiralty, to determine whether the transfer of the vessel was valid, such inquiry being one to "be undertaken in the courts of the Republic of Colombia"; and, "in any event, this court as an admiralty court has the right

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[20] R 88-92.

[21] R 93-102. Excerpts from the proceedings in these cases which "reveal that Walter W. Keene, one of the principal stockholders, and director and manager of both respondent corporations" treated them "as his personal chattels" and "personally collected the insurance" on the M/V Cali (dissenting opinion of Judge McCord in Court of Appeals, pp. 17-18) are in the transcript of the instant case. R 121-156.

to refuse the assumption of such non-maritime jurisdiction and . . . does refuse to . . . inquire into any alleged scheme or device which may exist or may have been entered into between the two respective respondents in the Republic of Colombia".[22]

Libelants applied for a rehearing,[23] and on November 5, 1948, the district court rendered its opinion denying the rehearing, holding that on the face of the libel as amended, the court, as a court of admiralty, had no jurisdiction to inquire into the question as to whether the transfer of the vessel was fictitious and in fraud of libelant's rights; that on the face of the pleadings title to the vessel had passed to Caribe; and that, until a Colombian court should annul the transfer as fraudulent, the vessel "is the property of" Caribe, and "is not subject to the foreign attachment" in the Canal Zone.[24]

The decree of the district court, entered November 10, 1948, recites that the court has found that the Steamship CARIBE "was solely owned" by Caribe; and then, only after ordering release of the vessel from attachment, requires Caribe, within thirty days thereafter, to "make answer as garnishee respecting any and all funds, indebtedness, money or property which it owes or has in its hands, belonging to" Transmaritima.[25] Significantly, libelant's interrogatories annexed to its amended libel, seeking sworn information as to Caribe's formation by

[22] R 104-113. Under its quoted ruling, the district court felt that "it must be held that the vessel Caribe . . . was at the time of" her attachment "the property of" Caribe. R 112.
[23] R 114-116.
[24] R 157-166.
[25] R 167-170.

the interests in control of Transmaritima, and as to the purported transfer of the vessel, were never required to be answered prior to the entry of the order releasing her attachment.

Libelants appealed from this decree,[26] and on May 30, 1949, the Court of Appeals for the Fifth Circuit affirmed the decree, Judge McCord dissenting.

The majority of the Court of Appeals conceded that the "affidavit evidence and the exhibits" were "not of the most satisfactory kind", but held that these were sufficient to place the burden on the libelants, under the motion to dismiss the libel and vacate the attachment, "to show some cause why the vessel should be held as the property of respondents";[27] that there had been "no adjudication of the title";[28] that the jurisdiction of a district court, sitting in admiralty, to determine whether a transfer is fraudulent at the instance of one whose claim has not yet been reduced to judgment, "is doubtful";[29] and that, in any event, "there is a discretion, as the court

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[26] R 170-184.

[27] Opinion, p. 7. In his dissent, Judge McCord indicated that this burden was on libelants, at least "to prove their case by their pleadings", but nevertheless took "issue with the statement of the majority" that libelants had not "proved anything at all to support their contention . . . that the vessel is really the property of respondents". Opinion, pp. 17, 18.

[28] Opinion, p. 7. See also opinion on petition for rehearing, p. 2. As hereinabove noted, the district court had held in both its opinions (R 112, 164), as it had found in its decree (R 168) that the vessel was "solely owned" by Caribe. As stated by Circuit Judge McCord in his dissent on the petition for rehearing: "Although the majority claim there has been no adjudication of the title to the seized vessel . . . their decision is predicated on the theory that the respondent Caribe is the true owner of the vessel . . . They are actually deciding the case on its merits adversely to libelants without according them the hearing to which they are entitled." Opinion, p. 5.

[29] Opinion, p. 8.

held, to refuse enquiry, even if there be jurisdiction, where the case is about foreign business and the transaction was between foreigners . . ." [30]

Judge McCord dissented because of the "far reaching effect and import" [31] of the majority opinion as a precedent, which, he stated, "appears to be that when foreign ship owners are about to be haled into our courts to answer for their negligence they may escape liability by a fraudulent transfer and sale of their vessels in a foreign jurisdiction, and thereby effectively oust our Federal courts of admiralty jurisdiction in attachment proceedings." [32]

He called attention to the fact that Swift & Company, "who owned half of the entire cargo of the lost vessel, is a citizen of the United States"; [33] that Transmaritima itself had claused its bills of lading on which the lost cargo was shipped as having effect "subject to the Carriage of Goods by Sea Act of the United States"; [34] and that "the carrier knew, or should have known that it was dealing with a citizen of the United States as the ultimate owner of fifty per cent. of the entire cargo of the vessel". [35]

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[30] Ibid. "We have not held that the libel *in personam* was wholly between foreigners, and that jurisdiction over it might be for that reason declined." Opinion of majority on petition for rehearing, p. 2.

[31] Opinion, p. 9.

[32] Opinion, p. 19.

[33] Opinion, p. 14.

[34] Opinion, p. 16. Of particular significance in light of respondents' contention that the case is beyond the jurisdiction of the courts of the United States, are the defensive pleas in the answer of one respondent based on the Carriage of Goods by Sea Act (R 76, 77), and that it "invokes the benefit of the provisions of the Revised Statutes of the United States . . . in limitation of the liability of shipowners". R 79.

[35] Opinion, p. 16. The name of Swift & Company appears as notify party on its bills of lading. R 50, 53.

On these facts, Judge McCord was "inclined to the view that the district court had no discretion to decline jurisdiction", but that, "even if there be such discretion, the district court clearly abused its discretion in declining to exercise its jurisdiction on a mere summary motion to vacate the attachment, supported only by incompetent and hearsay affidavits and exhibits, when the jurisdictional facts were clearly in dispute." [36]

Judge McCord further found that "since the original judge in the above ruling had already considered the question of declining jurisdiction as a matter of discretion, libelants were entitled to rely upon his ruling, and the question of whether he properly exercised his discretion on the original motion was hardly open for review or further consideration by his successor in office." [37]

III

Reasons Relied on for Allowance of the Writ

The Court of Appeals for the Fifth Circuit, by a divided court, has decided important questions of federal jurisdiction which have not been, but should be, settled by this court, on one of which points there seems to be a direct conflict with a prior opinion of the Court of Appeals for the Ninth Circuit.*

That the questions decided are important, is emphasized in the dissenting opinions of one of the judges of the

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[36] Opinion, p. 14.

[37] Opinion, p. 16. In his opinion on rehearing, the successor judge himself pointed out that the motion which he sustained was that of March 15, 1948, which his predecessor had overruled. R 158.

* The Celtic Monarch, 138 Fed. 711 (CCA 9).

Court of Appeals who referred to the "far reaching effect and import" of the decision as a precedent under which "foreign ship owners . . . may . . effectively oust our federal courts of admirality jurisdiction in attachment proceedings"; and that "this is an important case, and the issues here decided will touch the business life of our Republic in a vital way".

Six opinions have been rendered in the case, three in favor of retention of jurisdiction by the district court, and three against it. The first district judge who heard the motion to dismiss and to vacate the attachment for want of jurisdiction, overruled the motion. The second district judge (successor to the first) simply reversed his predecessor, held that he was without jurisdiction, or legally entitled, in his discretion, to decline to take jurisdiction, sustained the motion to dismiss, and ordered the attachment dissolved.

Two judges of the Court of Appeals held that, on the basis of evidence "not of the most satisfactory kind", the district court was without jurisdiction, and that the district judge had the discretionary right to decline jurisdiction even though his predecessor in office had previously exercised that discretion in favor of jurisdiction. A third judge of the Court of Appeals, dissenting, held directly to the contrary on each point made in the majority opinion.

The dissenting judge of the Court of Appeals stated that he was "inclined to the view that the district court had no discretion to decline jurisdiction", and cited auth-

orities which, by analogy, support his view. The majority of the court held that "there is a discretion . . . to refuse inquiry, even if there be jurisdiction", but could find no authority to support its holding.

Similarly, while the dissenting judge found "ample authority" by analogy "for the proposition that a court of admiralty has jurisdiction to inquire into the ownership of property attached under its process, and into the *bona fides* of a sale of such property by a respondent, even where the purported assignment takes place prior to the attachment", the majority conceded that "we believe there is no precedent for what was attempted".

On petition for rehearing; the majority of the Court of Appeals wrote another opinion denying the application. The third judge, again dissenting, characterized the case as an important one whose issues "will touch the business life of our Republic in a vital way"; and deplored the fact that the majority "are actually deciding the case on its merits adversely to libelants without according them the hearing to which they are entitled".*

The issues in the case of *The Celtic Monarch*, cited in the foregoing footnote, it is submitted are practically identically the same as those in the case at bar; and the opinion of the majority in the case at bar, it is submitted, is almost directly contrary to that of the Court of Appeals for the Ninth Circuit in the cited case.

* "Upon these issues the libelant was clearly entitled to give evidence, and it is manifest that the merits of the cause could not properly be disposed of in advance of the determination of those issues". The Celtic Monarch, 189 Fed. 711, 718 (CCA 9).

It is further submitted that there is apparently no direct holding of this court on any of the questions preesnted in the case at bar, on which the opinions of the judges of the lower courts were so sharply divided. There can, in any event, hardly be any doubt as to the importance of the questions of federal jurisdiction involved, on one of which there is apparent conflict between the Courts of Appeal for the Fifth and Ninth Circuits. None of these questions has apparently been, and all of them should unquestionably be, settled by this court.

IV

Basis of Jurisdiction

Jurisdiction is invoked under section 1254 of Title 28 of the United States Code.

The original opinions of the Court of Appeals for the Fifth Circuit were filed May 30, 1949; petition for rehearing was filed June 17, 1949; and rehearing was denied with majority and dissenting opinions July 20, 1949.

WHEREFORE petitioner prays that a writ of certiorari issue under the seal of this court, directed to the United States Court of Appeals for the Fifth Circuit, commanding said court to certify and send to this court a full and complete transcript of the record and of the proceedings of said Court of Appeals for the Fifth Circuit; had in the case numbered and entitled on its docket, No. 12,608, *Swift & Company Packers, et al., appellants, vs Compania Colombiana del Caribe, SA, appellee*, to the end that this

cause may be reviewed and determined by this court as provided for by the statutes of the United States; and that the judgment herein of said Court of Appeals for the Fifth Circuit be reversed by this court, and for such other and further relief as this court may deem proper.

EBERHARD P. DEUTSCH,
HARRY F. STILES, JR.,
Counsel for Petitioner.

New Orleans, August . . . ., 1949.

DEUTSCH, KERRIGAN & STILES,
Of Counsel.

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1949

No. .....

SWIFT & COMPANY PACKERS, et al.,
Petitioners and Appellants Below,

versus

COMPANIA COLOMBIANA DEL CARIBE, SA.,
Respondent and Appellee Below.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

Opinions of Courts Below

Neither the original majority and dissenting opinions of the judges of the Circuit Court of Appeals for the Fifth Circuit, nor the majority and dissenting opinions on petition for rehearing in the same court, all annexed to the record, have as yet, so far as counsel can learn, been reported.

The original memorandum opinion of one of the judges of the District Court for the Canal Zone, upholding the position of appellants (Tr. pp. 70-72) does not seem to have been reported. Subsequent reversing opinions of the other district judge (Tr. pp. 104, 157) are reported at 83 F. Supp. 273.

II

Jurisdiction

Jurisdiction is invoked under section 1254 of Title 28 of the United States Code.

The opinions of the Court of Appeals for the Fifth Circuit were filed May 30, 1949. A petition for rehearing was filed June 17, 1949, and rehearing was denied, with majority and dissenting opinions, on July 20, 1949.

As shown in the petition for the writ of certiorari in support of which this brief is filed, the Court of Appeals has decided important questions of federal jurisdiction, one of them in conflict with an applicable decision of the Court of Appeals for the Ninth Circuit; and, in any event, none of such questions has been, and all should be, settled by this court.

As to the importance of the questions of federal jurisdiction involved, the dissenting judge of the Court of Appeals referred to "the far reaching effect and import" of the decision, under which, as a precedent, foreign ship owners may "effectively oust our federal courts of admiralty jurisdiction in attachment proceedings"; and to

the fact that "this is an important case" whose issues "will touch the business life of our Republic in a vital way".

III

Statement of the Case

The preceding petition for writ of certiorari contains a "Summary Statement of the Matter Involved",* which is adopted, without repetition, as the "Statement of the Case" of this brief.

IV

Specification of Errors.

1. The court erred in holding that a district court of the United States has discretion to decline jurisdiction of a proceeding instituted by a citizen of the United States against foreign respondents, for loss of cargo shipped under bills of lading expressly made subject to the Carriage of Goods by Sea Act of the United States, one of respondent's defenses being a plea of limitation of liability under statutes of the United States, even though citizens of other countries are joined as libelants (for their own interests) and the cargo was moving between foreign ports when lost.

2. The court erred in holding that the question as to whether a district judge of the United States, prior to his retirement, properly refused to decline discretionary jurisdiction of a proceeding in admiralty, is open to review by his successor in office.

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* Pp. 2-10, ante.

3. The court erred in holding that a district court of the United States, sitting in admiralty, does not have jurisdiction to determine for itself whether a vessel seized under process of foreign attachment is actually the property of a foreign respondent.

4. The court erred in holding that a mere proctor's affidavit on information and belief, to the effect that a vessel seized under process of foreign attachment is not owned by the respondent, filed in an admiralty proceeding in a district court of the United States in support of a motion to dismiss and vacate the attachment for want of jurisdiction of the court, places on the libelant the burden of showing why the vessel should be held and jurisdiction maintained.

V

Summary of the Argument

Point A

A district court of the United States has no discretion to decline jurisdiction of a proceeding instituted by a citizen of the United States and others against foreign respondents for loss of cargo shipped between foreign ports under bills of lading expressly governed by the Carriage of Goods by Sea Act of the United States, one of respondent's defenses being a plea of limitation of liability under statutes of the United States.

Point B

The question as to whether a district judge of the United States, prior to his retirement, properly refused to decline discretionary jurisdiction of a proceeding in admiralty is not open to review by his successor in office.

Point C

A district court of the United States, sitting in admiralty, has jurisdiction to determine for itself whether a vessel seized under process of foreign attachment is actually the property of a foreign respondent.

Point D

A mere proctor's affidavit on information and belief, to the effect that a vessel seized under process of foreign attachment is not owned by the respondent, filed in an admiralty proceeding in a district court of the United States in support of a motion to dismiss and vacate the attachment for want of jurisdiction of the court, does not place on the libelant the burden of showing why the vessel should be held and jurisdiction maintained.

VI

Argument

Point A

A district court of the United States has no discretion to decline jurisdiction of a proceeding instituted by a citizen of the United States and

> others against foreign respondents for loss of cargo shipped between foreign ports under bills of lading expressly made subject to the Carriage of Goods by Sea Act of the United States, one of respondent's defenses being a plea of limitation of liability under statutes of the United States.

As shown in the statement of facts, half of the cargo of the lost vessel was owned by a citizen of the United States. Its name appears on the bills of lading issued for the cargo. The bills of lading contain an express provision to the effect that they are subject to the Carriage of Goods by Sea Act of the United States.[1] One of the foreign respondents, in its answer, further "invokes the benefit of the provisions of the Revised Statutes of the United States . . . in limitation of the liability of shipowners".[2]

Joined with the citizen of the United States as libelants are several citizens of Cuba and one of Colombia, each, however, suing for his own interest. The cargo was moving from a port in Ecuador to ports in Cuba when it was lost. Both respondents are, on the record, Colombian corporations. Questions of foreign law may be involved in a determination of the issue as to validity of the purported transfer of the vessel between the respondents.

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[1] 49 Stat. 1207-1213; 46 USC 1300-1315. "This bill of lading shall have effect subject to the Carriage of Goods by Sea Act of the USA, and the carrier and the ship shall be entitled to all of the rights and immunities set forth in said Act. To the extent that any term of this bill of lading is repugnant to, or inconsistent with anything in such Act, it shall be void." R 51, 54, 57. In its answer, one of the respondents pleads that it "is entitled to all exemptions and defenses provided for" in a section of that act, and that it "is excused from liability under the appropriate section of the" act. R 76, 77.

[2] R 79.

A citizen of the United States should not be denied access to the courts of his own country merely because his case involves an incidental question as to whether a purported transfer between foreign respondents among themselves was fictitious, especially when the citizen of the United States pleads that the transfer was in fraud of his rights.

The main issue of the case, it must be remembered, centers around a claim for lost cargo shipped under a bill of lading whose provisions are, by their own terms, to be construed under a statute of the United States, specifically pleaded by way of defense, in the answer.[3] One of the foreign respondents further invokes another statute of the United States by way of defense. That respondent "knew, or should have known, that it was dealing with a citizen of the United States, as the ultimate owner of fifty per cent. of the cargo of the vessel".[4]

No direct precedent has been found holding that in such a case, a district court of the United States has no discretion to decline jurisdiction. Cases which hold that exercise of discretion on the part of a district judge in declining to take jurisdiction of proceedings in admiralty exclusively between foreigners will not be disturbed unless abused,[5] obviously do not sanction such an exercise of discretion as to a proceeding instituted by a citizen of the United States, even when joined by non-citizens appearing exclusively for the assertion of their own separate interests.

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[3] R. 76, 77.
[4] Dissenting opinion, p. 16.
[5] Canada Malting Company vs Paterson Steamships, 285 US 413; Charter Shipping Co. vs Bowring, 281 US 515.

It is submitted, however, that the holding of this court in *In re Louisville Underwriters*,[6] is equally applicable to the situation at bar: "To compel suitors in admiralty . . . to resort to the home of the defendant, and to prevent them from suing him in any district in which . . . his goods or credits (may be) attached . . . would in many cases amount to a denial of justice."[7]

It is respectfully submitted that a district court must accept jurisdiction in such a case, and may not, in its discretion, decline to do so.

Point B

The question as to whether a district judge of the United States, prior to his retirement, properly refused to decline discretionary jurisdiction of a proceeding in admiralty is not open to review by his successor in office.

It will be recalled that respondents originally filed a motion to dismiss and vacate the attachment for want of jurisdiction, on March 15, 1948. This motion was denied on March 31 by the district judge then in office. He retired on the following day.

Later, a successor judge was appointed, a second motion to dismiss and vacate was filed, and the matter was submitted to him. He expressly sustained the first mo-

[6] 134 US 488.
[7] Ibid., at p. 493.

tion,[8] stating that he declined, in any event, to exercise his right to take jurisdiction.[9]

In other words, the first judge exercised his discretion, if he had it, to take jurisdiction of the case when the matter came up under the motion filed March 15. His successor reviewed that exercise of discretion, reversed it, and declined to take jurisdiction under the same motion.

No precedent has been found directly on this point. It has been held, however, that the exercise of discretion by a district court as to whether it will entertain an action in admiralty solely between foreigners will not be disturbed, even on appeal, unless the discretion has clearly been abused.[10]

It is submitted that a district judge should not be permitted to hold that his predecessor had abused his discretion in taking jurisdiction of a case, reverse that discretion, and dismiss the proceeding.

Point C

A district court of the United States, sitting in admiralty, has jurisdiction to determine for itself whether a vessel seized under process of foreign attachment is actually the property of a foreign respondent.

The district judge held that he had no jurisdiction, as a court of admiralty, to adjudicate the issue as to whether

[8] "The motion on which the court acted was filed herein on March 15, 1948 . . ." R 158.
[9] R 112.
[10] Canada Malting Company vs Paterson Steamships, 285 US 413; Charter Shipping Co. vs Bowring, 281 US 515.

the vessel attached was actually the property of respondent,[11] and the majority of the Court of Appeals held the jurisdiction to be "doubtful".[12]

One must not let the trees obscure the forest. The proceeding is one by a citizen of the United States for loss of cargo. The proceeding was instituted by foreign attachment. The respondents contend that a few days before the attachment, the vessel attached had been transferred by the respondent alleged to be at fault in the loss of the cargo. Libelants contend that the transfer was fictitious and in fraud of their rights.

This controversy as to transfer of the vessel, is clearly only incidental to the main issue for negligent loss of cargo. Can it be said that a citizen of the United States may be deprived of access to the courts of his own country, by such a device used by foreign respondents, and that a court of the United States may say that the legality of the device may be determined only by the courts of respondents' country, and that accordingly the United States court is without jurisdiction of the main controversy, under the attachment?

As stated by the dissenting judge of the Court of Appeals in the case at bar: "The import of this decision, as precedent, appears to be that when foreign ship owners

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[11] R 163.

[12] Opinion, p. 8. "We held only that the question of the organization of the corporation Caribe and its relationship to the corporation Transmaritima, and its liability for the latter's debts, involved transactions in the Republic of Colombia and under its laws, with the witnesses and evidence located there, and that the supplementary libel *in personam* against Caribe might be dismissed for that reason." Opinion of majority of Court of Appeals on petition for rehearing, p. 2.

are about to be haled into our courts to answer for their negligence they may escape liability by a fraudulent transfer and sale of their vessels in a foreign jurisdiction, and thereby effectively oust our federal courts of admiralty jurisdiction in attachment proceedings." [13]

It may be, as suggested by the majority of the Court of Appeals, that "there is no precedent" for the right of a court of admiralty to take jurisdiction of a case to determine whether property has been transferred in fraud of a creditor "before a judgment has been obtained" against the person alleged to have effected the fraudulent transfer.[14]

It is submitted, however, that such cases as *Lee vs Thompson*,[15] *Gardner vs Dantzler*,[16] and the others cited by the dissenting judge of the Court of Appeals [17] are so closely analogous in their holdings and dicta as to constitute precedents for the point involved.

It is further submitted that if these cases are not directly in point, and, as held by the majority of the Court of Appeals, "there is no precedent" for the point, this court should settle this important question of federal jurisdiction as to whether an admiralty court of the United States is competent to determine whether property seized under its process of foreign attachment belongs to the respondent, and whether a transfer thereof was fictitious and in fraud of the rights of the libelant.

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[13] Opinion, p. 19.
[14] Opinion, p. 8.
[15] Fed. Cas. 8202.
[16] 98 F2d 478 (CCA 5).
[17] Opinion, p. 12.

Point D

A mere proctor's affidavit on information and belief, to the effect that a vessel seized under process of foreign attachment is not owned by the respondent, filed in an admiralty proceeding in a district court of the United States in support of a motion to dismiss and vacate the attachment for want of jurisdiction of the court, does not place on the libelant the burden of showing why the vessel should be held and jurisdiction maintained.

The majority of the Court of Appeals held that while the affidavits and exhibits were "not of the most satisfactory kind", they were nevertheless sufficient "to require the libelants to show some cause why the vessel should be held as the property of respondents".[18]

The dissenting judge of the Court of Appeals felt that "there was no competent evidence whatever introduced in support of the motion . . . The affidavits and exhibits of respondents' counsel . . . are highly prejudicial and objectionable as self-serving, hearsay declarations, and should never have been considered by the district court".[19]

The only evidence before the district court in behalf of respondents were the affidavits of their proctor, made on information and belief, and certain exhibits annexed to those affidavits. The Federal Rules of Civil Procedure apply, by analogy and in the absence of conflicts, to proceedings in admiralty. Rule 56(e) provides: "Supporting . . . affidavits shall be made on personal knowledge,

[18] Opinion, p. 17.
[19] Opinion, p. 15.

shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein."

Copy of a vessel's registry has been held by this court not to constitute evidence of title or ownership.[20] There is ample precedent that foreign law must be proven in admiralty as any other fact, and will not be accepted on a mere certificate.[21] A district court of the United States should, in any event, hardly accept, as having evidentiary value, the opinion of a Colombian lawyer to the effect "that the courts of justice of the Canal Zone completely lack jurisdiction to make a decision on the claim against" two Colombian corporations.

As hereinabove noted, there would seem to be a direct conflict on this point between the decision in the case at bar, and that of the Court of Appeals for the Ninth Circuit in *The Celtic Monarch*.[22] In the cited case, attachment of a vessel under a libel *in rem* for collision damage was sought to be vacated under a rule of the district court of Washington, precisely the same as that of the Canal Zone court.

An answer was filed, setting up defenses to the libel, including new facts. On this answer, supported by two affidavits of eyewitnesses to the collision, the claimant of The Celtic Monarch moved for summary dismissal of the attachment under Rule 35 of the district court of Washington, identically the same in its terms as Rule 23 of the Canal Zone district invoked at bar.

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[20] The Navemar, 303 US 68.

[21] Christie vs Carlisle, 11 F2d 659 (ED La.); Avalon-Presidente Wilson, 1929 AMC 1602 (SD NY); The Hanna Neilson, 25 F2d 984 (WD Wash.).

[22] 138 Fed. 711 (CCA 9).

The Washington district court accepted as true the new facts in the answer and supporting affidavits, and held the case to be one subject to summary judgment under its local Rule 35, which might be "finally disposed of in that summary proceeding, resembling a motion for judgment on the pleadings in an atcion at law".

The Court of Appeals pointed out that Admiralty Rule 51 (now 48) provides that new facts pleaded by a respondent are deemed denied by the libelant, and it could "see no possible justification" for summary dismissal of attachment of a vessel in admiralty on answer and affidavits involving issues forming part of the merits of the controversy: "Upon these issues the libelant was clearly entitled to give evidence, and it is manifest that the merits of the cause could not properly be disposed of in advance of the determination of those issues."[23]

In the case at bar, involving a situation at least closely analogous to that in the cited case, the majority of the Court of Appeals for the Fifth Circuit upheld release of attachment of the vessel by the district court on summary process by affidavit under an identical local rule, saying: "The affidavit evidence and the exhibits, while not of the most satisfctory kind, were enough under this rule to require the libelants to show some cause why the vessel should be held as the property of respondents. Neither on the hearing, nor on the rehearing . . . have libelants proved anything at all to support their contention[24] . . .

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[23] Ibid., at p. 718.

[24] The dissenting judge took "issue with the statement of the majority" that libelants had failed to offer such proof. "Evidently", he said, "they ignore the fact that libelants introduced . . . testimony of disinterested parties in other proceedings in the Federal courts" which "sheds considerable doubt on the good faith of the alleged transfer." Opinion, p. 18.

As a summary remedy the motion to vacate was properly sustained."[25]

The close analogy between the two cases, and the conflict in the holdings of the Courts of Appeals for the Fifth and Ninth circuits, are emphasized in the language of the dissent in the case at bar, strikingly similar to that of the Ninth Circuit, quoted above:[26] "They (the majority) are actually deciding the case on its merits adversely to libelants without according them the hearing to which they are entitled."[27]

It is accordingly respectfully submitted that for the reasons stated in the petition and in this brief, a writ of certiorari should issue herein to enable this court to settle the important points of federal jurisdiction on all of which there has been such sharp division among the judges of the courts below, and on one of which there is an apparent conflict between the holding of the Court of Appeals for the Fifth Circuit in the case at bar and that of the Ninth Circuit in a prior case.

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[25] Opinion, p. 7.
[26] See footnote 23, supra.
[27] Opinion on application for rehearing, p. 5.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1949

No. 230 230

SWIFT & COMPANY PACKERS, et al.,

Petitioners,

versus

COMPANIA COLOMBIANA del CARIBE, SA,

Respondent.

BRIEF IN BEHALF OF PETITIONERS

EBERHARD P. DEUTSCH
and
HARRY F. STILES, JR.,
Proctors for Petitioners.

DEUTSCH, KERRIGAN & STILES,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1949

No. 230

SWIFT & COMPANY PACKERS, et al.,
Petitioners,

versus

COMPANIA COLOMBIANA del CARIBE, SA,
Respondent.

BRIEF IN BEHALF OF PETITIONERS

I

Official Reports of Opinions Below

The original majority and dissenting opinions of the Court of Appeals for the Fifth Circuit were filed May 30, 1949 (Tr 128 et seq.). The majority and dissenting opinions of that court on application for rehearing were rendered July 20, 1949 (Tr 153 et seq.). All four opinions of the Court of Appeals for the Fifth Circuit are reported at 175 F2d 513, et seq.

The original memorandum opinion rendered March 31, 1948 by the judge of the District Court of the Canal Zone,

upholding the position of petitioners (Tr 49) does not seem to have been reported. Subsequent opinions of the successor district judge, rendered September 30, and November 5, 1948, reversing his predecessor (Tr 72, 107) are reported at 83 F. Supp. 273.

II

Basis of Jurisdiction

Jurisdiction of this court was invoked by petition for certiorari under *section 1254* of *Title 28* of the *United States Code*. Certiorari was granted on October 10, 1949.

III

Statement of the Case

The proceeding under review was instituted originally by libel in admiralty for loss during late January, 1948, of a cargo of rice from the Motor Vessel CALI, which foundered while en route from Ecuador to Cuba. Half of the cargo was owned by Swift & Company, Packers, a Nevada corporation, and the remainder by citizens of Cuba, except for one parcel owned by a Colombian.[1]

The Motor Vessel CALI was owned by Compania Transmaritima Colombiana, a Colombian corporation, hereinafter simply called Transmaritima. This company also owned another vessel called the ALACRAN. Libel was filed in behalf of Swift & Company and the other cargo

[1] Libel, tr 1, et seq. The shipments were all made under bills of lading expressly claimed to be subject to the Carriage of Goods by Sea Act of the United States (Tr 34, 37, 40).

owners (each for its own interest), on March 7, 1948, in the District Court of the Canal Zone, against Transmaritima, jurisdiction being sought by attachment of the ALACRAN.[2]

The vessel was attached by the marshal on March 8.[3] On the same day a supplemental and amended libel was filed, alleging that libelants had just learned that an attempt had been made, on or about March 4, 1948, to transfer the Steamship ALACRAN, renamed CARIBE, to a Colombian corporation just formed by the beneficial owners of Transmaritima, in anticipation of the assertion, and in fraud, of libelants' rights. This new corporation was Compania Colombiana del Caribe, hereinafter simply called Caribe.[4]

It was further alleged that the attempted transfer of the vessel was fictitious, that the two companies were actually one, and that Caribe was in fact the *alter ego* of Transmaritima. The amended libel prayed for attachment of the vessel in the hands of both companies, or in the hands of Caribe as in fact the property of Transmaritima or as security for the alleged purchase price in the purported act of sale.[5]

To this supplemental libel, were annexed searching interrogatories, requiring Caribe to state under oath, all of the facts surrounding formation of that company, and the purported transfer of the vessel to it.[6] The vessel was again attached by the marshal on the same day.[7]

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[2] Libel, tr. 1, et seq.
[3] Tr 11-14.
[4] Tr 15, et seq.
[5] Ibid.
[6] Tr 18-20. These interrogatories have never been answered (See *post*).
[7] Tr 21-23.

On March 15, the master of the vessel claimed her as property of Caribe;[8] and that company moved to dismiss the libel and vacate the attachment of the vessel on the grounds that the action was between foreigners, that the alleged fraudulent transfer of the vessel raised issues which ought to be decided only in Colombia, and that "no sufficient cause has been alleged why this court should hear this matter."[9]

Attached to this motion, was a document denominated an affidavit, executed by proctor for both Transmaritima and Caribe, setting forth his argument in support of his motion,[10] annexing a copy of the "certificate of registry" of the vessel at Barranquilla, Colombia on March 4,[11] and the opinion of a Colombian lawyer that "the Courts of justice of the Canal Zone are absolutely incompetent to decide regarding a claim of this nature."[12]

On March 31, the judge of the district court overruled the motion to dismiss the libel and vacate the attachment, and refused to decline jurisdiction.[13] The district judge retired on the following day,[14] and none was appointed to succeed him until the end of June.[15]

On June 11, 1948, more than two months after filing of the libels, answers thereto were filed by the same proctor in behalf of both respondents.[16]

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[8] Tr 23-25.
[9] Tr 25-26.
[10] Tr 27-32. "On the same day the new company by its proctors made a motion, supported by an affidavit which is mainly a legal argument . . ." Opinion of Court of Appeals, Tr 129.
[11] Tr 42-43. Such a certificate is not evidence of title or ownership. The Navemar, 303 US 68, 73.
[12] Tr 44, 46.
[13] Tr 49-51.
[14] 75 F. Supp. x.
[15] 77 F. Supp. x.
[16] Tr 52, 57.

Transmaritima's answer pleads in defense, certain provisions of the Carriage of Goods by Sea Act of the United States,[17] and "invokes the benefit of the provisions of the Revised Statutes of the United States . . . in limitation of the liability of shipowners." [18]

Respondent Caribe, with its answer, filed "Exceptions and Objections to Libelants' Interrogatories." The interrogatories sought sworn information as to the formation of Caribe and the circumstances surrounding transfer of the vessel.[19]

These exceptions are stated to be based, in part, on the fact that the interrogatories "are aimed pointedly to obtain and 'fish' into the evidence." [20] The interrogatories are concededly aimed at obtaining, under direct oath of respondent's officers,[21] evidence in support of libelants' charges. The district court has never ruled on these exceptions, and libelants' interrogatories have never been answered.

Another ground of exception to the interrogatories really amounts to admission of the charges contained in the libel, for the respondent avers that the "interrogatories refer to matters which are, in view of the supplemental and amended libel, known to the libelants." [22]

And yet proctor for Caribe has protested volubly that "not a shred of evidence in any form was offered . . . to

[17] 49 Stat. 1207-13, 46 USC 1300-15.
[18] 27 Stat. 445, 46 USC 192.
[19] Tr 59-60.
[20] Tr 59.
[21] As required under Admiralty Rule 31, rather than on hearsay by proctor as in his motion to dismiss.
[22] Tr 60.

prove any of the allegations of fraud" [22] made in the suplemental libel!

In this connection, it is pointed out that the dissenting judge of the Court of Appeals took "issue with the statement of the majority that" libelants had not "proved anything at all in support of their contention;" and he called attention to "the fact that libelants introduced portions of the records" in other related cases pending in other federal courts, the evidence in which "strongly tends to show some connection between the two respondents, and sheds considerable doubt on the good faith of the alleged transfer." [23]

On August 17, 1948, proctor for respondents again moved to dismiss the libel and vacate the attachment on substantially the same grounds as theretofore urged and overruled, with the added suggestion that the district court, sitting in admiralty, was without jurisdiction to determine the validity of the transfer of the vessel. [24]

In support of this renewed motion, proctor for respondents submitted another document in the form of an affidavit by himself, on information and belief, expanding somewhat on his prior statement, and alleging that the controlling interests in the two corporations are substantially different, although disclosing that Walter W. Keene

[22] Brief of repondent in opposition to petition for certiorari, p. 6. See also ibid, *passim*, and p. 20, referring to "petitioners' rights" which "rested upon facts which they alleged but could not prove".

[23] Tr 140. It is significant too, that various "gear, hoists, winches, etc., from the M V Cali," concededly the property of Transmaritima, were still on board the S S CARIBE, allegedly no longer belonging to Transmaritima, when that vessel was attached in this proceeding. Tr 11, 21.

[24] Tr 61-63.

and Eulogio Echaverri, stated to be managing director and "sub-manager" respectively of both companies, owned 51 out of 100 shares of Transmaritima, and 47 out of 50 shares of Caribe.[26] This document also called attention to other proceedings on the same causes of action instituted by libelants in New York and Texas against the same respondents, and against Keene as effective owner of both.[27]

Proctors for libelants were given only a few days' notice of hearing on respondent's motion to dismiss.[28] The answers of both respondents had previously been filed on the same day by the same proctor, and both answers contained prayers for adjudication of title to the S S CARIBE. The case was ready for trial on its merits, and proctors for libelants had no reason to believe that evidence in support of their position was to be adduced before trial.[29]

Further, the original motion to dismiss had been overruled by the court, and it seemed inconceivable that a successor judge would disregard that ruling and sustain

[26] There is, of course, no inference of difference in substantive interests in control of the two corporations to be drawn from the fact that some of the remaining shares are held nominally by different holders. The real ownership interests can be shown only after libelants' searching interrogatories shall have been answered, and the witnesses subjected to cross-examination on the trial.

[27] Tr 63-70. Excerpts from the proceedings in these cases which "reveal that Walter W. Keene, one of the principal stockholders, and director and manager of both respondent corporations" treated them "as his personal chattels" and "personally collected the insurance" on the M/V Cali (dissenting opinion of Judge McCord in the Court of Appeals, Tr 140) are in the transcript of the instant case. Tr 83-106.

[28] The motion was filed in the Canal Zone on August 17. The date fixed for the hearing, later postponed, was August 23. Tr 60.

[29] "I do not believe it fair or just to thus penalize libelants as derelict in failing to prove their case . . . before they have had a reasonable opportunity to do so by testimony at a fair hearing." Dissent of Judge McCord on petition for rehearing to Court of Appeals. Tr 156.

the motion so renewed. Accordingly, no evidence was introduced in behalf of libelants at the hearing of the renewed motion to dismiss.

On September 20, 1948, the new district judge sustained the motion to dismiss the libel and vacate the attachment, holding that he was without jurisdiction, sitting in admiralty, to determine whether the transfer of the vessel was valid, such inquiry being one to "be undertaken in the courts of the Republic of Colombia;" and, "in any event, this court as an admiralty court has the right to refuse the assumption of such non-maritime jurisdiction and... does refuse to...inquire into any alleged scheme or device which may exist or may have been entered into between the two respective respondents in the Republic of Colombia." [30]

Libelants applied for a rehearing,[31] and in support of their application offered the records in related proceedings pending in other federal courts,[32] to which reference has already been made. The evidence in these records impressed the dissenting judge of the Court of Appeals as strongly supporting libelant's allegations of fraud.[33]

On November 5, 1948, the district court rendered its opinion denying the rehearing, holding that on the face of the libel as amended, the court, as a court of admiralty, had no jurisdiction to inquire into the question as to whether the transfer of the vessel was fictitious and in

[30] Tr. 72-78. Under its quoted ruling, the district court felt that "it must be held that the vessel Caribe . . . was at the time of" her attachment "the property of" Caribe. Tr 77.
[31] Tr 78-80.
[32] Tr 83-106.
[33] Tr. 140.

fraud of libelants' rights; that on the face of the pleadings title to the vessel had passed to Caribe; and that, until a Colombian court should annul the transfer as fraudulent, the vessel "is the property of" Caribe, and "is not subject to the foreign attachment" in the Canal Zone.[34]

The decree of the district court, entered November 10, 1948, recites that the court has found that the Steamship CARIBE "was solely owned" by Caribe; and, then, only after ordering release of the vessel from attachment, requires Caribe, within thirty days thereafter, to "make answer as garnishee respecting any and all funds, indebtedness, money or property which it owes or has in its hands, belonging to" Transmaritima.[35]

Significantly, libelant's interrogatories annexed to its amended libel, seeking sworn information as to Caribe's formation by the interests in control of Transmaritima, and as to the purported transfer of the vessel, were never required to be answered prior to the entry of the order realeasing her attachment.

Libelants appealed from this decree,[36] and on May 30, 1949, the Court of Appeals for the Fifth Circuit affirmed the decree, Judge McCord dissenting.

The majority of the Court of Appeals conceded that the "affidavit evidence and the exhibits" were "not of the most satisfactory kind," but held that these were sufficient to place the burden on the libelants, under the motion to

[34] Tr 107-113.
[35] Tr 114-116.
[36] Tr 116-126.

dismiss the libel and vacate the attachment, "to show some cause why the vessel should be held as the property of respondents";[37] that there had been "no adjudicatoin of respondents";[37] that there had been "no adjudication sitting in admiralty, to determine whether a transfer is fraudulent at the instance of one whose claim has not yet been reduced to judgment, "is doubtful;"[38][39] and that, in any event, "there is discretion, as the court held, to refuse enquiry, even if there be jurisdiction, where the case is about foreign business and the transaction was between foreigners. . ." [40]

Judge McCord dissented because of the "far reaching effect and import" [41] of the majority opinion as a precedent, which, he stated, "appears to be that when foreign ship owners are about to be haled into our courts to answer for their negligence they may escape liability by a fraudulent transfer and sale of their vessels in a foreign jurisdiction, and thereby effectively oust our Federal courts of admiralty jurisdiction in attachment proceedings." [42]

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[37] Tr. 132. In his dissent, Judge McCord stated that "it was not incumbent upon libelants to prove their case by their pleadings"; and he took sharp "issue with the statement of the majority" that libelants had not "proved anything at all to support their contention . . . that the vessel is really the property of respondents." Tr 140, 141.

[38] Tr 133. See also opinion on application for rehearing, tr 154. As hereinabove noted, the district court had held in both its opinions (Tr 77, 111-112) as it had found in its decree (Tr 114) that the vessel was "solely owned" by Caribe. As stated by Circuit Judge McCord in his dissent on the petition for rehearing: "Although the majority claim there has been no adjudication of the title to the seized vessel . . . their decision is predicated on the theory that the respondent Caribe is the true owner of the vessel . . . They are actually deciding the case on its merits adversely to libelants without according them the hearing to which they are entitled." Tr 156.

[39] Tr 133.

[40] Ibid. "We have not held that the libel *in personam* was wholly between foreigners, and that jurisdiction over it might be for that reason declined." Opinion of majority on petition for rehearing, tr 154.

[41] Tr 134.

[42] Tr 141.

He called attention to the fact that Swift & Company, "who owned half of the entire cargo of the lost vessel, is a citizen of the United States";[43] that Transmaritima itself had claused its bills of lading under which the lost cargo was shipped, as having effect "subject to the Carriage of Goods by Sea Act of the United States";[44] and that "the carrier knew, or should have known that it was dealing with a citizen of the United States as the ultimate owner of fifty per cent of the entire cargo of the vessel."[45]

On these facts, Judge McCord was "inclined to the view that the district court had no discretion to decline jurisdiction", but that, "even if there be such discretion, the district court clearly abused its discretion in declining to exercise its jurisdiction on a mere summary motion to vacate the attachment, supported only by incompetent and hearsay affidavits and exhibits, when the jurisdictional facts were clearly in dispute."[46]

Judge McCord further found that "since the original judge in the above ruling had already considered the question of declining jurisdiction *as a matter of discretion*, libelants were entitled to rely upon his ruling, and the question of whether he properly exercised his discretion

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[43] Tr 137.

[44] Tr 139. Of particular significance in light of respondents' contention that the case is beyond the jurisdiction of the courts of the United States, are the defensive pleas in the answer of one respondent based on the Carriage of Goods by Sea Act (Tr 53, 54), and that it "invokes the benefit of the provisions of the Revised Statutes of the United States . . . in limitation of the liability of shipowners": Tr. 55.

[45] Tr 139. The name of Swift & Company appears as notify party on the bills of lading. Tr 33, 36.

[46] Tr 137.

on the original motion was hardly open for review or further consideration by his successor in office." [47]

And Judge McCord concluded significantly: "In the present state of the record, no one can truthfully say whether libelants are entitled to relief against anyone, but surely they are entitled to be heard." [48]

IV

Specification of Errors

1. The court erred in holding that a district court of the United States, sitting in admiralty, does not have jurisdiction to determine for itself whether a vessel seized under its own process of foreign attachment had been transferred fraudulently by the foreign respondent a few days prior to the attachment for the purpose of avoiding it, actually remains subject to attachment as property of the respondent.

2. The court erred in holding that a district court of the United States, sitting in admiralty, has discretion to decline jurisdiction of a proceeding instituted by a citizen of the United States and others, by process of foreign attachment, against foreign respondents, for loss of cargo moving between foreign ports under bills of lading expressly made subject to the Carriage of Goods by Sea Act of the United States, one of respondent's defenses being a plea of limitation of shipowner's liability under statutes of

[47] Tr 139. In his opinion on rehearing, the successor district judge himself pointed out that the motion which he sustained was that of March 15, 1948, which his predecessor had overruled. Tr 107.
[48] Tr 156.

the United States, and involving an issue as to whether a purported transfer by the respondent of the vessel attached, a few days before the attachment for the purpose of avoiding it, was fictitious and fraudulent.

3. The court erred in holding that the question as to whether a district judge of the United States, prior to his retirement, properly refused to decline discretionary jurisdiction of a proceeding in admiralty, is open to review by his successor in office.

4. The court erred in holding that a mere proctor's affidavit on information and belief, to the effect that a vessel seized under process of foreign attachment is not owned by the respondent, filed in support of a motion to dismiss the libel which alleges recent fraudulent transfer of the vessel to avoid the attachment, places on the libelant the burden of showing why the vessel should be held and jurisdiction maintained to escape summary dismissal of the proceeding.

V

Argument

Point A

A district court of the United States, sitting in admiralty, has jurisdiction to determine for itself whether a vessel seized under its own process of foreign attachment had been transferred fraudulently by the foreign respondent a few days prior to the attachment for the purpose of avoiding it, and actually remains subject to attachment as property of the respondent.

The district judge held that he had no jurisdiction, as a court of admiralty, to adjudicate the issue as to whether the vessel attached was actually the property of respondent,[1] and the majority of the Court of Appeals held the jurisdiction to be "doubtful."[2]

One must not let the forest obscure the trees. The proceeding is one by a citizen of the United States for loss of cargo. The proceeding was instituted by foreign attachment. The respondents contend that a few days before the attachment, the vessel attached had been transferred by the respondent alleged to be at fault in the loss of the cargo, to the other respondent. Libelants contend that the transfer was fictitious and in fraud of their rights.

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[1] Tr 111.

[2] Tr 133. "We held only that the question of the organization of the corporation Caribe and its relationship to the corporation Transmaritima, and its liability for the latter's debts, involved transactions in the Republic of Colombia and under its laws, with the witnesses and evidence located there, and that the supplementary libel *in personam* against Caribe might be dismissed for that reason." Opinion of majority of Court of Appeals on application for rehearing, tr 154.

This controversy as to transfer of the vessel, is clearly only incidental to the main issue for negligent loss of cargo. Can it be said that a citizen of the United States may be deprived of access to the courts of his own country, by such a device used by foreign respondents, and that a court of the United States may say that the legality of the device may be determined only by the courts of respondents' country, and that accordingly the United States is without effective jurisdiction, in the main controversy, to hold the security under its attachment?

Respondent Transmaritima had not been cited except through the attachment. But it hastened into court to plead that the property attached did not belong to it, and that the attachment should be dissolved, while submitting itself without security to the jurisdiction of the court for adjudication of the claim for cargo damage against it.

The majority of the Court of Appeals sanctioned dissolution of the attachment which stood as security for the cargo claim, on the ground that the district court was without jurisdiction to determine that the vessel attached had been transferred fraudulently by the respondent a few days prior to the attachment.

While, therefore, as stated by the majority of the Court of Appeals, technically "jurisdiction has not been declined but retained"[3] against Transmaritima alone, jurisdiction has in fact been declined on the important issue of fraudulent transfer of libelant's security under attachment *pendente lite*. And a judgment rendered against a foreign corporation in such a proceeding, "where there is no

[3] Opinion on application for rehearing, tr 154.

security under court attachment, is practically worthless, for there would be no process enforceable against it."[4]

As stated by the dissenting judge of the Court of Appeals in the case at bar: "The import of this decision, as precedent, appears to be that when foreign ship owners are about to be haled into our courts to answer for their negligence they may escape liability by a fraudulent transfer and sale of their vessels in a foreign jurisdiction, and thereby effectively oust our federal courts of admiralty jurisdiction in attachment proceedings."[5]

It may be, as suggested by the majority of the Court of Appeals, that "there is no precedent" for the right of a court of admiralty to take jurisdiction of a case to determine whether property has been transferred in fraud of a creditor "before a judgment has been obtained" against the person alleged to have effected the fraudulent transfer.[6]

It is submitted, however, that such cases as *Lee vs Thompson*,[7] *Gardner vs Dantzler*,[8] and the others cited by the dissenting judge of the Court of Appeals[9] are so closely analogous in their holdings and dicta as to constitute precedents for the point involved.

It is further submitted that if these cases are not directly in point, and, as held by the majority of the Court of

[4] Dissenting opinion of Judge McCord, tr 140.
[5] Tr 141.
[6] Tr 133.
[7] Fed. Cas. 8202.
[8] 98 F2d 478 (CCA 5).
[9] Tr 136.

Appeals, "there is no precedent" for the point, this court should settle this important question of federal jurisdiction, and should hold that an admiralty court of the United States is competent to determine whether property seized under its process of foreign attachment belongs to the respondent, and whether a transfer thereof was fictitious and fraudulent for the very purpose of avoiding the attachment.

Point B

A district court of the United States, sitting in admiralty, has no discretion to decline jurisdiction of a proceeding instituted by a citizen of the United States and others, by process of foreign attachment, against foreign respondents, for loss of cargo moving between foreign ports under bills of lading expressly made subject to the Carriage of Goods by Sea Act of the United States, one of respondent's defenses being a plea of limitation of shipowner's liability under statutes of the United States, and involving an issue as to whether a purported transfer by the respondent of the vessel attached, a few days before the attachment for the purpose of avoiding it, was fictitious and fraudulent.

As shown in the statement of facts, half of the cargo of the lost vessel was owned by Swift & Company Packers, a citizen of the United States. Its name appears on the bills of lading issued for the cargo.

Proctors for respondent have urged that because Swift & Company became the holder in due course of the bills

of lading for the cargo subsequently lost, by transfer from the foreign shipper to whom they had originally been issued, Swift stands in the shoes of the foreign shipper, "and the court may nevertheless decline jurisdiction at discretion." [10]

It is, however, a fundamental principle of the law of carriage of goods, that the bona fide holder of a bill of lading is entitled to sue in his own right for breach of the contract of carriage.[11] "It makes no difference that libelants severally bought interests in the rice cargo while in transit, as they were nevertheless entitled to safe delivery of their respective property." [12]

The bills of lading contain an express provision to the effect that they are subject to the Carriage of Goods by Sea Act of the United States.[13] One of the foreign respondents, in its answer, further "invokes the benefit of the provisions of the Revised Statutes of the United States . . . in limitation of the liability of shipowners." [14]

Joined with the citizen of the United States as libelants are several citizens of Cuba and one of Colombia, each, however, suing for his own interest. The cargo was moving from a port in Ecuador to ports in Cuba when it

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[10] Brief in opposition to petition for certiorari, p. 15.
[11] The Steamship Thames vs Billop Seaman, 14 Wall. (81 US) 98.
[12] Dissenting opinion of Judge McCord, tr 139.
[13] 49 Stat. 1207-1213; 46 USC 1300-1315. "This bill of lading shall have effect subject to the Carriage of Goods by Sea Act of the USA, and the carrier and the ship shall be entitled to all of the rights and immunities set forth in said Act. To the extent that any term of this bill of lading is repugnant to, or inconsistent with anything in such Act, it shall be void." Tr 34, 37, 40. In its answer, one of the respondents pleads that it "is entitled to all exemptions and defenses provided for" in a section of that act, and that it "is excused from liability under the appropriate section of the" act. Tr 53, 54.
[14] Tr 55.

was lost. Both respondents are, on the record, Colombian corporations. Questions of foreign law may be involved in a determination of the issue as to validity of the purported transfer of the vessel between the respondents.

A citizen of the United States should not be denied access to the courts of his own country merely because his case involves a question as to whether a purported transfer between foreign respondents among themselves was fictitious, especially when the citizen of the United States pleads that the transfer was in fraud of his rights.

The main issue of the case, it must be remembered, centers around a claim for lost cargo shipped under a bill of lading whose provisions are, by their own terms, to be construed under a statute of the United States, specifically pleaded by way of defense, in the answer.[15] One of the foreign respondents further invokes another statute of the United States by way of defense. That respondent "knew, or should have known, that it was dealing with a citizen of the United States, as the ultimate owner of fifty per cent. of the entire cargo of the vessel." [16]

No direct precedent has been found holding that in such a case, a district court of the United States has no discretion to decline jurisdiction. Cases which hold that exercise of discretion on the part of a district judge in declining to take jurisdiction of proceedings in admiralty exclusively between foreigners will not be disturbed unless abused,[17] obviously do not sanction such an exercise of discretion as

[15] Tr 53, 54.
[16] Dissenting opinion, tr 139.
[17] Canada Malting Company vs Paterson Steamships, 285 US 413; Charter Shipping Co. vs. Bowring, 281 US 515.

to a proceeding instituted by a citizen of the United States, even when joined by non-citizens appearing exclusively for the assertion of their own separate interests.

It is submitted, however, that the holding of this court in *In re Louisville Underwriters*,[18] is equally applicable to the situation at bar: "To compel suitors in admiralty ...to resort to the home of the defendant, and to prevent them from suing him in any district in which...his goods or credits (may be) attached...would in many cases amount to a denial of justice." [19]

It is respectfully submitted that a district court must accept jurisdiction in such a case, and may not, in its discretion, decline to do so.

Point C

The question as to whether a district judge of the United States, prior to his retirement, properly refused to decline discretionary jurisdiction of a proceeding in admiralty, is not open to review by his successor in office.

It will be recalled that respondents originally filed a motion to dismiss and vacate the attachment for want of jurisdiction, on March 15, 1948. This motion was denied on March 31 by the district judge then in office. He retired on the following day.

Later, a successor judge was appointed, a second motion to dismiss and vacate was filed, and the matter was sub-

[18] 134 US 488.
[19] Ibid., at p. 493.

mitted to him. He expressly sustained the first motion,[20] stating that he declined, in any event, to exercise his right to take jurisdiction.[21]

In other words, the first judge exercised his discretion, if he had it, to take jurisdiction of the case when the matter came up under the motion filed March 15. His successor reviewed that exercise of discretion, reversed it, and declined to take jurisdiction under the same motion.

No precedent has been found directly on this point. It has been held, however, that the exercise of discretion by a district court as to whether it will entertain an action in admiralty solely between foreigners will not be disturbed, even on appeal, unless the discretion has clearly been abused.[22]

It is submitted that a district judge should not be permitted to hold that his predecessor had abused his discretion in taking jurisdiction of a case, reverse that discretion, and dismiss the proceedings.

Point D

A mere proctor's affidavit on information and belief, to the effect that a vessel seized under process of foreign attachment is not owned by the respondent, filed in support of a motion to dismiss the libel which alleges recent fraudulent transfer of the vessel to avoid the attachment, does not

[20] "The motion on which the court acted was filed herein on March 15, 1948 . . ." Tr 107.

[21] Tr 77.

[22] Canada Malting Co. vs Paterson Steamships, 285 U S 413; Charter Shipping Co. vs Bowring, 281 U. S. 515.

place on the libelant the burden of showing why the vessel should be held and jurisdiction maintained to escape summary dismissal of the proceeding.

Respondent's motion to dismiss was supported by affidavit of respondent's proctor "which is mainly a legal argument," [23] together with an opinion by a Colombian attorney to the effect that "the Courts of justice of the Canal Zone are absolutely incompetent to decide regarding a claim of this nature." [24]

This motion was treated by the majority of the Court of Appeals as having been made pursuant to Rule 23 of the District Court of the Canal Zone [25] providing that, in proceedings by foreign attachment, upon evidence showing "any improper practice or a manifest of equity on the part of libelant", any interested party may obtain an order from the judge requiring the libelant to show cause why the attachment should not be vacated.

"The motion on which the (district) court acted", filed "on March 15, 1948," [26] contains no mention of, nor reference, direct or indirect,[27] to Rule 23. The district court itself, in its first opinion, treated the motion as one for "summary judgment under Rule 12b of the Federal Rules of Civil Procedure." [28]

Rule 23 of the Canal Zone district, as pointed out by the dissenting judge of the Court of Appeals in the case at bar, "shows clearly on its face that it is not applicable to

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[23] Tr 129.
[24] Tr 46.
[25] Tr 132.
[26] Tr 107.
[27] Tr 25-26.
[28] Tr 74. On rehearing, the court conceded that it had erred in this regard.

the instant proceeding", because it "is clear to the effect that unless competent evidence of either an 'improper practice' or a 'manifest want of equity' on the part of libelant be shown, the order to show cause why attachment should not be vacated will not issue"; [29] and he found that "there was no competent evidence whatever introduced in support of the motion to dismiss...nor was there any substantial conformity or compliance with Admiralty Rule 23." [30]

The majority of the Court of Appeals held that while the affidavits and exhibits were "not of the most satisfactory kind", and constituted "mainly a legal argument", they were nevertheless sufficient "to require the libelants to show some cause why the vessel should be held as the property of respondent." [31]

The only evidence before the district court in behalf of respondents were the affidavits of their proctor, made on information and belief, and certain exhibits annexed to those affidavits. The Federal Rules of Civil Procedure apply, by analogy and in the absence of conflicts, to proceedings in admiralty.[32] Rule 56(e) provides: "Supporting ...affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein."

Copy of a vessel's registry has been held by this court not to constitute evidence of title or ownership.[33] There

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[29] Dissenting opinion, tr 138.
[30] Ibid.
[31] Opinion, tr 129, 132.
[32] Untersinger vs United States, 172 F2d 298 (CCA 2).
[33] The Navemar, 303 US 68.

is ample precedent that foreign law must be proven in admiralty as any other fact, and will not be accepted on a mere certificate.[34] A district court of the United States should, in any event, hardly accept, as having evidentiary value, the opinion of a Colombian lawyer to the effect "that the Courts of justice of the Canal Zone completely lack jurisdiction to make a decision on the claim against" two Colombian corporations.

There would seem to be a direct conflict on this point between the decision of the majority of the Court of Appeals for the Fifth Circuit in the case at bar, and that of the Court of Appeals for the Ninth Circuit in *The Celtic Monarch*.[35] In the cited case, attachment of a vessel under a libel *in rem* for collision damage was sought to be vacated under a rule of the district court of Washington, precisely the same as that of the Canal Zone court.

An answer was filed, setting up defenses to the libel, including new facts. On this answer, supported by two affidavits of eye-witnesses to the collision, the claimant of *The Celtic Monarch* moved for summary dismissal of the attachment under Rule 35 of the district court of Washington, identically the same in its terms as Rule 23 of the Canal Zone district invoked at bar.

The Washington district court accepted as true the new facts in the answer and supporting affidavits, and held the case to be one subject to summary judgment under its local Rule 35, which might be "finally disposed of in this

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[34] Christie vs Carlisle, 11 F2d 659 (ED La.); Avalon-Presidente Wilson, 1929 AMC 1602 (SD NY); The Hanna Neilson, 25 F2d 984 (WD Wash.).

[35] 138 Fed. 711 (CCA 9).

summary proceeding, resembling a motion for judgment on the pleadings in an action at law."

The Court of Appeals reversed. It pointed out that Admiralty Rule 51 (now 48) provides that new facts pleaded by a respondent are deemed denied by the libelant, and it could "see no possible justification" for summary dismissal of attachment of a vessel in admiralty on answer and affidavits involving issues forming part of the merits of the controversy: "Upon these issues the libelant was clearly entitled to give evidence, and it is manifest that the merits of the cause could not properly be disposed of in advance of the determination of those issues." [36]

In the case at bar, proctor's "affidavit which is mainly a legal argument" [37] in support of respondent's motion to dismiss, should certainly be given no greater evidentiary weight than was the answer of the claimant supported by two eye-witness affidavits in the cited case.

The motion to dismiss, and supporting proctor's affidavit, were at most simply a defensive plea which "alleges new facts . . . considered as denied by the libelant," [38] raising issues to be determined on the trial of the merits of the entire controversy, and not under a local rule providing for summary dissolution of an attachment obtained by "improper practice."

In the case at bar, involving a situation at least closely analogous to that in the cited case, the majority of the Court of Appeals for the Fifth Circuit upheld release of

[36] Ibid., at p. 718.
[37] Tr 129.
[38] General Admiralty Rule 48.

attachment of the vessel by the district court on summary process by affidavit under an identical local rule, saying: "The affidavit evidence and the exhibits, while not of the most satisfactory kind, were enough under this rule to require the libelants to show some cause why the vessel should be held as the property of respondents. Neither on the hearing, nor on the rehearing...have libelants proved anything at all to support their contention [39] ...As a summary remedy the motion to vacate was properly sustained." [40]

The close analogy between the two cases, and the conflict in the holdings of the Courts of Appeals for the Fifth and Ninth circuits, are emphasized in the language of the dissent in the case at bar, strikingly similar to that of the Ninth Circuit, quoted above: [41] "They (the majority) are actually deciding the case on its merits adversely to libelants without according them the hearing to which they are entitled." [42]

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[39] The dissenting judge took "issue with the statement of the majority" that libelants had failed to offer such proof. "Evidently," he said, "they ignore the fact that libelants introduced . . , testimony of disinterested parties in other proceedings in the Federal courts" which "sheds considerable doubt on the good faith of the alleged transfer." Tr 140.

[40] Opinion, tr 132-133.

[41] See footnote 36, supra.

[42] Opinion on application for rehearing, tr 156.

CONCLUSION

It is accordingly respectfully submitted that the decision of the majority of the Court of Appeals for the Fifth Circuit, should be reversed, and the case remanded for trial on its merits.

Respectfully submitted,

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New Orleans,
November, 1949.

This is to certify that copies of this brief have been served on opposing counsel on this the ..... day of November, 1949.

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IN THE

Supreme Court of the United States

OCTOBER TERM—1949

No. 230

SWIFT & COMPANY PACKERS, *et al.*,

Petitioners and Appellants Below,

—against—

COMPANIA COLOMBIANA DEL CARIBE, S. A.,

Respondent and Appellee Below.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Statement of the Case

The order here involved was one made *pendente lite* by the District Court for the Canal Zone, in a cause of suit in admiralty for cargo damage against a carrier *in personam*. The order vacated the attachment of a vessel, alleged to have been the property of the carrier respondent, which had been levied upon pursuant to a writ of foreign attachment issued under the permissions of General Admiralty Rule No. 2. The moving party and respondent here (not the carrier) was the claimant of the attached vessel,

and was also named as a respondent in an amended and supplemental libel after the initial seizure was made.

The affreightment was entirely foreign to the citizenship and commerce of the United States. The libels allege that one Noboa, a Colombian citizen, at Guayaquil, Ecuador, shipped about 30,000 bags of rice with Cia. Transmaritima Colombiana, S. A., a Colombian corporation, owner of the motorship CALI, a Colombian flag vessel, for delivery to his order in Cuban ports. The CALI lifted the shipment, issued her order bills of lading to Noboa and sailed on her voyage. En route, she sprang a leak, and, in sinking condition, was beached at Grand Cayman, where she and a part of the rice became totally lost on January 17, 1948. The petitioners (libelants) are Noboa, the shipper, various Cuban nationals and Swift and Company Packers, the latter alleged to be a Nevada corporation. The Cuban libelants and Swift are alleged to have "become the owners" of various parcels of the rice, and, of course, derived whatever rights they had by assignment or transfer from Noboa.

At the time of the affreightment the carrier, Cia. Transmaritima, also owned and operated the Colombian flag steamship ALACRAN (now CARIBE). This vessel, which had nothing to do with the movement of the rice, continued to operate under the ownership and management of the carrier for approximately six weeks after known loss of the CALI.[1] About February 25, 1948, Cia. Transmaritima sold this ship to a newly incorporated Colombian corporation, Cia. Colombiana del Caribe, S. A., the respondent here.[2] The bill of sale was openly recorded in Colombia, and on March 4, 1948 the ALACRAN having then arrived at Barranquilla, Colombia, on a voyage from Cuba, the

1 Her movements are given in detail at R. 98.

2 We shall hereinafter call this respondent "Cia. Caribe" and the carrier respondent "Cia. Transmaritima".

transaction was consummated by the delivery of the ship to Cia. Caribe. At the same time her name was officially changed from ALACRAN to CARIBE, her former registration was cancelled and a new certificate of registry was issued under her new name and ownership (R. 59-61, 94, 108, 195). Thereafter, operated by Cia. Caribe, she loaded cargo for Pacific ports and sailed for Cristobal, where she arrived and started her transit of the Canal on March 8th. As she passed through the Atlantic locks she was seized by the Marshal under the process issued in this cause (R. 18-9, 98).

On Sunday, March 7, the Canal Zone District Judge being absent in the United States, the original libel was filed. It is the conventional admiralty libel *in personam* for cargo damage. It names the carrier Cia. Transmaritima as the sole respondent and prays that if that respondent cannot be found within the District, its goods, etc., "in particular a certain vessel known as the ALACRAN or the CARIBE" be attached by process of foreign attachment (R. 3-14). On the same day, process *in personam* with clause of foreign attachment was issued by the Clerk, and the Marshal, evidently without any attempt to find and serve Cia. Transmaritima, boarded the CARIBE and took her into custody (R. 16-9, 105).

A few hours later on the same day the amended and supplemental libel was filed, which joined Cia. Caribe as a respondent, reiterated the allegations of the original libel and added the matter in Pars. II, III and IV (R. 23-8). The essence of the addition is that since the filing of the original libel, the libelants learned of the sale and transfer of the ship to Cia. Caribe; that the latter is the "alter ego" of Cia. Transmaritima and that the sale was fraudulent, fictitious and designed to defraud the libelants. It alleges alternatively that Cia. Caribe is indebted to Cia. Transmaritima for the purchase price of the vessel. Attachment

of the CARIBE was prayed as being the property of both respondents. New process was issued and the Marshal made a second seizure of the CARIBE (R. 31-3), which still remains in his custody. The Marshal made no personal service on either respondent, nor did he seek to find either of them (R. 32-3, 193).

Due to the Judge's absence, Cia. Caribe was unable to seek summary relief. On March 15, the CARIBE's master filed his verified claim to the vessel, asserting sole ownership of Cia. Caribe and his lawful possession as its bailee (R. 36-7). Both respondents appeared specially and Cia. Caribe moved to vacate the attachment (R. 39-41). The papers were sent to the incumbent Judge, Hon. Bunk Gardner, then in Kentucky (R. 71). On March 31, Judge Gardner overruled the motion, stating his conclusion that it "cannot be sustained at this time and on this showing," and that the overruling was "without prejudice to the respondents filing any further motions that they may desire to file" (R. 70-2). On the following day Judge Gardner resigned his office and the District was without a Judge for several months thereafter (R. 194).

Cia. Transmaritima then appeared generally and answered the libels on the merits (R. 74-81). Cia. Caribe also answered, reasserting its ownership and possession of the vessel at and prior to the institution of the proceeding and denying any connection with the affreightment and loss on the CALI (R. 82-5).

On August 16, just after the new Judge, Hon. Joseph J. Hancock, had assumed his duties, Cia. Caribe, on the papers on file and a detailed factual affidavit by one of its proctors (R. 93-102), moved to vacate the attachment of the CARIBE and dismiss the amended and supplemental libel as to it (R. 89-92). When the motion was heard (August 30th), the libelants offered no proofs whatsoever that the CARIBE was the property of Cia. Transmaritima, the carrier, nor

did it object to or offer any contradiction of the proofs submitted by Cia. Caribe (R. 160, 194, 197, 224). Indeed, counsel conceded that, prior to suit and levy, Cia. Caribe had legal title to the ship. Their position was that they were entitled, despite Cia. Caribe's motion and proofs, to hold the vessel under attachment upon the bare allegations of their amended and supplemental libel.

After full consideration, Judge Hancock granted the motion to the extent of ordering the attachment of the CARIBE vacated and the vessel released (Opn., R. 104-13). He held, however, that the attachment was good as to certain parts and strippings of the wrecked CALI which were on board the CARIBE[3] and that Cia. Caribe, as garnishee, should be required to answer in due course as to any property, debts and credits belonging to the carrier, Cia. Transmaritima, in its possession or control at the time of the seizure (R. 112).

The libelants sought a rehearing, which was denied (R. 157-66) and a formal order for the release of the vessel was entered (R. 167-70). Giving a bond to maintain the vessel in custody, the libelants appealed to the Court of Appeals for the Fifth Circuit, which affirmed the order (R. 206-7) and denied a petition for rehearing (R. 228). One judge dissented in each instance.

The Proofs, Issues and Decisions

Cia. Caribe made proof of its title, possession and operation of the ship attached, together with proof tending to negative the allegations that the transfer was fraudulent. Its motion to discharge the attachment was a summary proceeding in accordance with conventional admiralty prac-

3 The CARIBE had picked up these strippings at Grand Cayman while en route to Cuba. See R. 98.

tice to determine issues of fact and law bearing on the right and validity of an attachment.

The libels, in so far as Cia. Transmaritima is concerned, allege a valid maritime cause of suit *in personam* on the theory of carrier's liability. As to Cia. Caribe, they allege no such thing. No claims whatever were asserted against Cia. Caribe based on the affreightment or loss. On any possible theory of the case, the ship was only subject to attachment if she was the legal property of Cia. Transmaritima, or if that Company still retained some equitable ownership in her sufficient to enable the physical ship to be attached as its property.[4] Cia. Caribe had possession, control and apparent title, with every presumption of fact, as against the libelants, that the title was untainted and *bona fide*.

The libelants were thus challenged by the motion to show some justification for the attachment of Cia. Caribe's ship, and were required to make at least a *prima facie* showing that she belonged to Cia. Transmaritima in fact or that that Company had some beneficial interest in her to justify her being held as its property. Without such showing, the petitioners stood convicted of having attached the property of one person for the alleged debt of another. The right of attachment, thus challenged, was essentially a question of fact.

The petitioners offered no proofs whatsoever. Not a shred of evidence in any form was offered to deny or contradict Cia. Caribe's title, possession or control, to show any existing property interest in Cia. Transmaritima, legal or equitable, to prove any of the allegations of fraud or to suggest any inference of fraud or bad faith in the sale transaction.

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4 The latter assumption is argumentative. We have never heard of an admiralty attachment of an *equity* in a ship or of the attachment of a ship because of "equities" existing in a respondent who did not have legal ownership.

Cia. Caribe's proofs were left undenied and uncontradicted on every aspect. In short, the petitioners defaulted all factual issues and chose to stand on the proposition that they were entitled to hold the ship under seizure upon the unsupported allegations of their libel, regardless of presumptions and Cia. Caribe's proofs.

The District Court made findings of fact, for the purposes of the summary proceeding (R. 107-9), as to the pleaded facts of the affreightment and to the effect that Cia. Caribe had been incorporated after the loss; that the stockholding and control of the two companies were not identical; that the sale of the ship had been made on February 25; that the name had been changed and the ship officially registered under the ownership of Cia. Caribe on March 4, and that thereafter and until the levy the ship had been operated by Cia. Caribe. These findings were in accordance with Cia. Caribe's proofs. The attachment of the ship was vacated and she was ordered to be released.

The Appellate Court affirmed. It expressed grave doubt that the order was appealable, since it determined no final rights (R. 195-6). It held that no maritime liability was asserted against Cia. Caribe or the ship; that the libel *in personam* against Cia. Transmaritima as carrier was good, as was the garnishment against Cia. Caribe requiring it to answer as to all property or debts of Cia. Transmaritima in its hands (R. 196). On the question of the validity of the attachment, it noticed the undisputed fact of the sale to Cia. Caribe prior to the seizure and the absence of any proof of possession or control by Cia. Transmaritima and held that under such circumstances the burden was surely on the petitioners to show a justification for her seizure (R. 196-7). It held that Cia. Caribe had the right to a prompt inquiry and that Admiralty Rule 23[5] of the District

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5 Text *infra*, p. 16, n. 10.

Court provided for such (R. 196). It decided that Cia. Caribe's proofs were sufficient under the rule to require the petitioners to show some cause why the vessel should be held (R. 197). The essence of the holding was that, despite more than ample opportunity, the petitioners had proved nothing at all to support their allegations that the ship was the property of Cia. Transmaritima or that it had any interest in her, legal or equitable (R. 197).

The balance of the opinion dealt with substantive and jurisdictional questions as to the attempt to involve Cia. Caribe as a respondent (R. 197-8). These points were merely cumulative against the attachment. They were not vital to the order but will be discussed to some extent in the argument.

By necessary implication the Court rejected the petitioners' position that they were entitled to maintain the attachment on the basis of bare allegations of fraud.

ARGUMENT

I

The attachment was primarily vacated for failure of factual proof to support the right to it.

There is no inherent right to an attachment in the admiralty. Under General Admiralty Rule No. 2; nothing may be reached by a writ of foreign attachment which is not the property of a respondent as to whom a valid maritime cause is stated. The writ will only issue on sworn allegations that the property sought to be sequestered is the property of the respondent sued. If alleged ownership is conceded by absence of challenge, a levy may be maintained *pendente lite*, but if the allegations of ownership are disputed, a square issue of *fact* is presented.

That was the case here. The factual issue, in essence, was whether Cia. Transmaritima had any property interest in the attached ship CARIBE. Cia. Caribe, possessor and title holder, offered proofs that Cia. Transmaritima had none. The attaching libelants offered no proofs showing any such interest. The District Court vacated the attachment, primarily upon that account. The Court of Appeals reviewed and affirmed.

The petitioners ask review by this Court, upon asserted important questions of law, ignoring the factual determinations against them by the two Courts below, which are alone sufficient to jusfify the order vacating the attachment.

II.

Petitioners' Points for granting a writ are unsubstantial and rest upon inaccurate statements of fact and law.

The petitioners urge four specific points or questions for the granting of a writ of review by this Court. We answer them, *seriatim*:

Point A. That the Court Declined Jurisdiction of the Suit on the Cargo Claim (Petitioners' Brief, 19-22).

The complete answer to this point is that the District Court did not decline jurisdiction of any aspect of the claim for cargo loss. It expressly retained such jurisdiction and afforded the libelants every incidental remedy to which they were able to establish a right. That is the only answer which can or need be made to Point A.

On the first motion before Judge Gardner, the Court was urged to throw out the whole case as involving exclusively a foreign transaction and foreign contracting parties. We think that motion should have been granted. But it was not granted and as the retention of jurisdiction was clearly a matter of discretion where a maritime cause was stated, that decision was accepted. The question of discretionary jurisdiction over the cargo cause of action was not pressed in the proceedings under examination.

Point B. That the District Judge Was Bound by the "Without Prejudice" Order of His Predecessor (Petitioners' Brief, 22-3).

The first motion presented to Judge Gardner *in absentia* was denied by him "at this time and upon this showing" and "without prejudice to the respondents' filing any fur-

ther motions they may desire to file" (R. 71-2). On the following day, Judge Gardner resigned.

The motion now under examination was presented to the successor judge. While some of the grounds were the same as on the previous motion, other grounds were asserted and augmented proofs were supplied.

The claim that Judge Gardner's order determined conclusively the validity of the attachment or even the matter of jurisdictional discretion seems utterly fantastic. His order did not even purport to do so, being made expressly *without prejudice*. Even had he purported to make a conclusive order on any issue he would have lacked the power. A cause, while *sub judice* in a district court, is under control of the *court*, not of an individual judge. Even a decision or judgment on the merits of a cause may be altered by a successor judge on motion to vacate or for new trial or rehearing.

The petitioners admit that there is no precedent or authority for their astonishing claim (Brief, 23). They cite, by way of purported analogy, two decisions of this Court holding that a discretionary acceptance or declination of jurisdiction by a District *Court* in admiralty is not reviewable *on appeal*.[6] Again we point out that the discretion is that of the District Court, not of any individual judge.

The point is not only unsubstantial but inaccurate, since the Court never declined jurisdiction of the maritime claim.

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[6] *Canada Malting Co. v. Paterson Steamships*, 285 U. S. 413; *Charter Shipping Co. v. Bowring, Jones & Tidy*, 281 U. S. 515.

Point C. That the District Court Denied Jurisdiction to Determine Property Ownership in the Vessel Seized (Petitioners' Brief, 23-5).

Of course the District Court had jurisdiction to adjudicate the issue as to whether the vessel attached was actually the "property of the respondent"! That it exercised its jurisdiction in this regard and determined the issues contrary to the petitioners' allegations is fully apparent from the opinions below.

The questions of jurisdiction, inherent or discretionary, dealt with in those opinions, relate only to the attempt to involve Cia. Caribe as a personal respondent on the allegations that it was a dummy for the carrier corporation or had acquired its ownership of the vessel through fraud. No jurisdictional objections were suggested as preventing a full inquiry as to any attachable interest retained in the carrier corporation. The Court inquired into that and held that none had been shown.

But the amended and supplemental libel sought also to hold Cia. Caribe as a personal respondent, to subject *it* to personal liability on the cargo claim and to sequester the ship as security for a personal judgment against it.

Quite aside from any question of the right to maintain an attachment, in which factual, procedural and equitable considerations were involved, it is obvious that if the libel or complaint failed to state a jurisdictional cause of action against Cia. Caribe, the whole case against it failed and all possible ancillary rights failed with it. Our motion challenged the jurisdiction of the District Court, as a court of admiralty, over the cause of suit tendered against Cia. Caribe and sought dismissal of the amended and supplemental libel as to it. Alternatively, we moved that, if the Court should hold that it had jurisdiction of the subject matter, it be declined on discretionary grounds. These

points in no way involved the maritime claim against the carrier nor would they have defeated the levy upon the ship if it could have been shown that the carrier had any attachable interest in her.

Without extended discussion, we offer these points and authorities in support of the jurisdictional position taken by the District Court as to the alleged cause of action against Cia. Caribe:

1. The jurisdiction of admiralty is limited to maritime causes of suit. That limitation is inherent. Admiralty courts proceed upon equitable principles, but they do not have the characteristic powers of a court of equity. They cannot entertain a bill for specific performance or to correct a mistake *or declare or enforce a trust or an equitable title,* or exercise jurisdiction in matters of account. *The Eclipse,* 135 U. S. 599, 608.

2. A non-maritime issue does not become maritime by being asserted with or as an incident to a maritime cause. The Court, retaining the maritime issue, will sever and dismiss the non-maritime issue. *The Ada,* C. A. 2, 250 Fed. 194.

3. The aspect of the amended and supplemental libel which seeks to attack the sale is patently and wholly non-maritime. It has the typical characteristics of a creditor's bill in equity to trace and apply assets of an alleged debtor in the hands of a third party. Such a subject matter is not of admiralty cognizance and such relief cannot be granted in an admiralty suit. *Yone Suzuki* v. *Central Argentine Ry. Co.,* C. A. 2, 27 F. 2d 795, cert. den., 278 U. S. 652. See also the District Court opinion in the same case, 19 F. 2d 645, 653, 1927 A. M. C. 678, 692.[7] The same

[7] This passage in the Federal Report was garbled by the printer.

rule was applied in *The Melmay*, D. C. Z., 1932 A. M. C. 1396,[8] where a ship, alleged to belong equitably to a maritime respondent, was attached. Application of the principles of the *Yone Suzuki* case resulted in vacating the attachment.

4. Cases in which a libelant seeks to reach and apply assets in the hands of a third party are to be distinguished from the "dummy" cases, where the real party contracts or acts in the name of another or "alter ego." Admiralty may then proceed against the ~~real~~ obligated party since he is the real maritime debtor. Cases of the latter character are *Gardner* v. *Dantzler Lumber Co.*, C. A. 5, 98 F. 2d 478, and *Luckenbach S. S. Co.* v. *W. R. Grace & Co.*, C. A. 4, 267 Fed. 676. Cia. Transmaritima used no "dummy" in the affreightment transaction and Cia. Caribe could not have been a dummy as it was not then in existence.

5. *Lee* v. *Thompson*, C. C. La., F. Cas. No. 8,202, involved a proceeding to trace property in aid of a writ of execution in an admiralty cause, liability upon the maritime cause of action having been adjudicated. The inquiry was had under the state practice under the express permissions of Gen. Adm. Rule 20. No such proceeding exists in aid of an admiralty attachment and state practices are inapplicable. The Court of Appeals held that if the petitioners should obtain a judgment against the carrier herein, the present holdings were without prejudice to any rights they might then have to enforce it (R. 198).

6. The foregoing paragraphs deal with lack of jurisdiction as to subject matter. Even if such jurisdiction existed, it is elementary that the District Court had power to decline jurisdiction at its discretion since, the transaction

8 Not reported in "Federal".

and suitors were foreign. The petitioners do not dispute the generality of this rule but think it inapplicable because of the presence, as a libelant, of Swift & Company Packers, allegedly a citizen of Nevada. But Swift's rights, if any, could only derive by assignment from Noboa, the foreign shipper. It was not a party to the affreightment and only appears on two of the CALI's bills of lading as a name with a Cuban address, to be *notified* upon the arrival of the shipment (R. 50-5). Where a citizen libelant asserts rights derived by assignment or subrogation from a foreign shipper, his rights are no greater than those of the person from whom he receives them, and the Court may nevertheless decline jurisdiction at discretion. *The Tricolor,* S. D. N. Y. 1 F. Supp. 934, aff'd. C. A. 2, 65 F. 2d 392; *Whittig* v. *Canada S. S. Lines,* W. D. N. Y., 59 F. 2d 428; *Insurance Co. of North America* v. *British India Co.,* E. D. La., 38 F. Supp. 47; *La Societe du Gaz v. Armateura Francais,* House of Lords, 23 Lloyds List L. R. 209.

These jurisdictional considerations merely cumulate justification for the discharge of the attachment; they do not underlie it. The libelant Swift and all the others are still in court on their maritime claim and have been protected in all valid rights of attachment and garnishment to which their process and showing entitled them.

Point D. That the Right to Attachment Is Not Triable upon Affidavit and Documentary Proof as to Facts (Petitioners' Brief, 26-9).

The *merits* of the cargo suit do not remotely involve any question as to the ownership of the CARIBE. That is only involved in a consideration of the petitioners' right to have attachment of her, *pendente lite,* and, conventionally, factual issues as to any such ancillary right are tried summarily on affidavits and other documentary proofs. Compare the

procedure to obtain an injunction *pendente lite* or sequestration of property by receivership in equity. Admiralty has ever followed the practice of summary proceedings to determine the validity of an attachment or arrest and proofs are usually in affidavit and exhibit form. Almost invariably these summary matters are brought on by notice and motion to vacate the attachment or by *ex parte* showing and order to show cause. Practically all the maritime districts have a specific rule, more or less identical with Canal Zone Admiralty Rule No. 23,[10] providing for summary disposition of rights in connection with arrests and attachments. The Court of Appeals held that our motion was made under that rule (R. 197, 224).

Where affidavits are competent as evidence, as in a summary proceeding, their weight is for the court, to be evaluated according to the circumstances, one of the most cogent being the weight of proof offered to contradict them. Proof by affidavit which may, on its face, have little probative value, becomes strong, perhaps conclusive, when the opposing party, having opportunity, fails to deny the facts asserted, explain them or offer controverting proof. *Union Bank* v. *Mott*, 9 Abb. Pr. (N. Y.) 106, 109; *Commissioners* v. *Purdy*, 13 Abb. Pr. (N. Y.) 434, 437-8; *National Life Ins. Co.* v. *Brasuell*, 209 Ky. 465, 217 S. W. 413.

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9 *The Heinrich Arp*, D. C. Z., 1930 A. M. C. 1198; *The Melmay*, D. C. Z., 1932 A. M. C. 1396 and 1933 A. M. C. 1057 (neither reported in "Federal"); *The Talmar*, E. D. Pa., 38 F. Supp. 615. For similar practice in law cases see *United States* v. *Specified Quantities of Intoxicating Liquors*, C. A. 2, 7 F. 2d 835, 836; *Skewan* v. *Hallenbach*, S. D. N. Y., 150 Fed. 231; *Birdsall* v. *Germain*, S. D. N. Y., 227 Fed. 953.

10 The Rule, in so far as pertinent to attachment, reads:

> "In case of the attachment of property, * * * any person having a right to intervene in respect of the thing attached, may, upon evidence showing any improper practice or manifest want of equity on the part of the libelant, have an order from the judge requiring the libelant to show cause instanter why the * * * attachment should not be vacated." (See 5 Benedict, Admiralty (6th Ed.) p. 481.)

The proctor's affidavits, particularly the second (R. 93-102) were not "mere denials" of ownership. The facts stated are probative, specific and affirmative and practically every one of them can be readily verified by any party from public records. The affidavits were sufficient to show affirmatively that the ship CARIBE was sold and delivered to Cia. Caribe before the proceedings herein were commenced; that the ownership and control of the two Colombian corporations were not identical and that her movements after the loss of the CALI, while the CARIBE was still owned by Cia. Transmaritima, were not those of a ship whose operator was seeking to evade its debts or withhold its property from the reach of any creditor. These facts were undenied and uncontroverted. Every presumption is that the sale was *bona fide*, absent proof that it was not. No proofs suggesting any taint upon the transaction were offered.[11]

We never claimed that the CARIBE's certificate of registry (R. 59-61) was a document of title or, of itself, probative

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11 The attention of the Court may be caught by the petitioners' partial quotation from a paragraph of the dissenting opinion below, at Brief 28, n. 24. See R. 204-5. The dissenting judge referred to the matter appearing at R. 121-156. This material was not *evidence* nor was it offered or received as such. It got into the record because at the time the petitioners filed their *closing* brief on their motion for rehearing in the District Court, they arbitrarily filed it with the Clerk. No leave of court was obtained. After the rehearing was denied, the petitioners included this material in their praecipe for the record for appeal (Items 26 and 27, R. 188) and we noted our objection in our cross praecipe (R. 190). It is not a legitimate part of the record.

Substantively, the material has nothing whatsoever to do with the ownership of the CARIBE. It consists of purported transcripts of answers to interrogatories and oral testimony given by garnishees in proceedings had in New York and Texas by these petitioners. Evidently the petitioners were endeavoring to run garnishments on the proceeds of an insurance policy which one Keene, a large stockholder of Cia. Transmaritima, carried in connection with the ship CALI. As a stockholder of the owning corporation, Keene would have a valid insurable interest in its property.

of ownership. It merely confirms the fact of registry in Cia. Caribe's ownership, that the transaction was openly and publicly accomplished and that the document of sale was publicly recorded.

The petitioners' case can derive no strength from the allegations of fraud in their libel. Pleadings are not evidence, either in a summary proceeding or on issues of merit. In *The Navemar*, 303 U. S. 68, 75, this Court said of a verified suggestion claiming possession of a vessel on behalf of the Spanish Ambassador as an intervening suitor:

> "But the filed suggestion, though sufficient as a statement of the contentions made, was not proof of its allegations."

But to give the petitioners the most favorable position possible, let us assume that the allegations of the amended and supplemental libel have the probative force of an affidavit. The verification is upon information and belief by a proctor residing in the Canal Zone. It alleges in substance that in a period of a few hours, the libelants "learned" of the sale of the ship in Colombia between two Colombian corporations and, with a wealth of conclusion, asserts that the intentions were fraudulent and the consideration fictitious or inadequate. That, as a statement of a contention, is one thing. As proof of the *facts*, it is nothing. It would seem apparent to any realist that the only *fact* which the verifier learned was the fact that a sale had been made. No basis for the rest of the allegations is inferable but in the imagination and hopes of the pleader.

Even if the allegations of the libel could be taken as evidence in support of the attachment, their *weight* as against the proofs of Cia. Caribe was for the Court to determine. The burden in the summary proceeding was on the peti-

tioners to justify their levy, as the Court of Appeals held[12] (R. 196).

In support of their point that the facts underlying the right to attach are not issuable summarily or on affidavit proof, the petitioners purport to see a conflict between the decision of the Fifth Circuit Court herein and the decision of the Ninth Circuit Court in *The Celtic Monarch*, 138 Fed. 711. There is no conflict, for the latter case dealt with the *merits* of a maritime cause *in rem*. The libel charged tortious participation in a collision by a tug and its tow, separately owned. The claimant of the tow filed affidavits denying tortious participation by the tow and moved to dismiss as to it. The Court held that as the negligence of the tow was a direct issue on the merits of the cause, it could not be determined summarily or on affidavit proof. Undoubtedly the decision was correct, but the instant case rests on very different considerations. The right to an attachment does not go to the merits.

Much of the difficulty of the petitioners in this case results from their apparent unwillingness to distinguish between a direct cause of suit *in rem* against a ship and the incidental right to attach a ship as the property of an *in personam* respondent. The petitioners have always argued their case as though, upon the occurrence of the loss, those interested in the CALI's cargo acquired some vested right to apply the uninvolved CARIBE in settlement of their claims. This same fallacy, we think, also underlies the views of the dissenting judge in the Court of Appeals. Much

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12 The petitioners evidently assume that the burden was on Cia. Caribe to prove an unassailable title in itself in order to defeat the attachment. They ignore the fact that the ship was seized while in Cia. Caribe's exclusive possession and control so, without affirmative proof, there would not be the smallest presumption that anyone else had any interest in her. The ultimate burden of showing an attachable interest is obviously upon the party who asserts the right.

stress is placed on those views. With all respect, we suggest that the dissenting opinions make assumptions and draw conclusions not supported by the record and, on several points, contrary to it. The idea seems to be inherent that admiralty attachment is a matter of basic right and that fraud and invalidity are to be assumed upon bare assertion. Since the case is not here on the merits, we shall presently spare the Court from a detailed criticism.

We cannot see in the case any questions of law of any public significance. Primarily the petitioners' rights, if any, rested upon facts which they alleged but could not prove. Two courts have held that they did not prove them.

Such points of law as were decided seem to have followed well established principles; the practices adopted and approved were conventional and the decisions are just.

The errors and novelties and the questions of great import which the petitioners claim they see in the decisions seem to be due to their own confusion as to what the issues were and what the courts below did or did not determine.

CONCLUSION

There was no substantial error in the proceedings below and no sufficient grounds for a further review have been shown. The petition should be denied.

Respectfully submitted,

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Proctor for Respondent.

NICHOLAS J. HEALY, 3RD,
Of Counsel.

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IN THE

Supreme Court of the United States

OCTOBER TERM—1949

No. 230

SWIFT & COMPANY, PACKERS, *et al.*,

Petitioners,

—v.—

COMPANIA COLOMBIANA DEL CARIBE, S. A.,

Respondent.

BRIEF ON BEHALF OF RESPONDENT

NICHOLAS J. HEALY, 3RD.,
Proctor for Respondent.

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CONCLUSION

The case should be remanded to the Court of Appeals with directions to dismiss the appeal for lack of appellate jurisdiction. In the alternative, this Court should affirm the decision of the Court of Appeals sustaining the District Court's order vacating the attachment of the S.S. CARIBE 46

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IN THE

Supreme Court of the United States

OCTOBER TERM 1949

No. 230

SWIFT & COMPANY, PACKERS, *et al.*,

Petitioners,

—v.—

COMPAÑIA COLOMBIANA DEL CARIBE, S. A.,

Respondent.

BRIEF ON BEHALF OF RESPONDENT

This is a review of an appeal from an order, *pendente lite*, vacating an attachment of the Steamship CARIBE, ex-ALACRAN, which was levied upon under a writ of foreign attachment in an admiralty cause pending in the District of the Canal Zone.

The CARIBE was not proceeded against *in rem*. She had no part in the maritime affreightment and loss upon which the suit is based and there was therefore no maritime lien against her. She is involved only as the subject of a foreign attachment levied upon her, purportedly under General Admiralty Rule No. 2, as the alleged property of an *in personam* respondent.

Respondent's Statement of the Case

Compañia Transmarstina Colombiana S. A.,[1] a Colombian corporation, was an ocean carrier engaged in

[1] Text, *infra*, p. 9

[2] Hereinafter for brevity called "Cia Transmaritima". This is the maritime respondent in the admiralty suit.

Colombian domestic and foreign commerce. It owned and operated the motorship CALI and the steamship ALACRAN in general trade in Pacific and Caribbean waters. In January, 1948, one Noboa, a Colombian national and one of the petitioners herein, engaged with Cia Transmaritima for the carriage on the CALI of a shipment of 30,000 bags of rice from Guayaquil, Ecuador, to ports in Cuba. The CALI loaded the shipment, bills of lading for it were issued to Noboa for delivery to his order at the Cuban ports of destination and the CALI sailed from Guayaquil on her voyage. En route and near the island of Grand Cayman, a British possession, the CALI sprung a serious leak and was beached on the island. The vessel and a part of the rice were totally lost on January 17, 1948.

It will be observed that the entire transaction was in foreign commerce. The parties to the affreightment were Colombian nationals, the ship was Colombian, the transportation was from Ecuador to Cuba and the loss was in British waters.

At the time of the loss, Cia Transmaritima owned the ALACRAN, as she was then named. For about six weeks after known loss of the CALI, the ALACRAN, openly operated by Cia Transmaritima, went about her regular business in the trade, calling at various ports in the area, including the ports of shipment and destination of the CALI's cargo, several Colombian ports and the ports of the Canal Zone.[3] She continued to be openly operated by Cia Transmaritima until February 25, 1948, when she was sold to Compania Colombiana del Caribe, S. A.,[4] a Colombian corporation incorporated during that month, which

3. Her movements (undisputed) during this period are shown in detail at T. 68.

4. Hereinafter called "Cia Caribe".

is the respondent in this Court. The sale was made pursuant to Public Deed No. 4 of February 25, 1948, recorded in Colombia. T. 42, 64. On March 4, 1948, when the ALACRAN arrived at the Colombian port of Barranquilla, she was officially re-registered under the name of Cia Caribe, as owner, a new "patente", or certificate of registry was issued to her, and her registered name was officially changed from ALACRAN to CARIBE, pursuant to Resolution No. 94 of that date. T. 42, 64. Thereafter she loaded cargo for Colombian west coast ports and, operated by Cia Caribe, sailed for Cristobal, Canal Zone, to fuel and to make her passage through the Canal. T. 64, 68, 74-5.

All these events had transpired before this suit was filed in the District Court, which was not done until March 7. No notice of claim or demand had ever been made to Cia Transmaritima as respects the loss of cargo on the CALI and there had been no threat of suit or legal proceedings against it in the Canal Zone, Colombia or elsewhere. T. 64.

The petitioners here are the libelants below. They are, Noboa, the Colombian shipper, fourteen firms and individuals alleged to be Cuban nationals and Swift and Company, Packers, alleged to be a Nevada corporation. All the libelants except Noboa allege that they "became the owners" of portions of the CALI's rice cargo and suffered damages because of its loss. T. 3, 5-7.

The petitioners selected the Canal Zone as the theatre of their contemplated litigation and evidently had advance notice of the arrival of the CARIBE. Their libel was filed on March 7, 1948 (a Sunday) and process thereon was issued by the Clerk and lodged with the Marshal on that day. T. 10, 11. The libel, disregarding imperfections, is more or less the conventional admiralty libel *in personam* for cargo loss or damage and names Cia Transmaritima as the sole respondent. Its prayer is for process citing the

respondent to appear and answer, or, if it cannot be found within the District, that *its* goods and chattels, "in particular a certain vessel known as the ALACRAN or the CARIBE"[5] may be attached by process of foreign attachment. T. 7-8. The process commanded the Marshal to cite the respondent if it could be found in the District and, if it could not be found, to attach its goods and chattels, in particular the steamship ALACRAN or CARIBE. T. 10.

According to the Marshal's return (T. 11-12), he made no attempt whatsoever to find the respondent in the District.[6] The CARIBE had fueled at Cristobal and while passing through the Gatun locks on March 8, 1948, the Marshal had boarded her. The return states that "in obedience to the Command contained therein, I served the same by going on board the SS CARIBE * * * by displaying the original to the Master * * * and by taking into my official custody the S. S. CARIBE * * * and also some gear, hoists, winches, etc., from the M. V. CALI". T. 11.

A few hours later on March 8, the petitioners filed their amended and supplemental libel (hereinafter called the "amended" libel), naming Cia Transmaritima *and* Cia Caribe as respondents.[7] Another process was issued directing the Marshal to cite the respondents and if *they* could not be found, to attach *their* goods and chattels, in particular the CARIBE. T. 20. Again without attempting to find or inquire for either respondent, the Marshal made

5 Evidently the petitioners' proctors had prior knowledge of the sale of the vessel or at least of her change of name.

6 It was well known the vessel's agent, Keene Line, maintained an office at Ancon, Canal Zone. It would seem that the barest good faith would call for the effort of inquiry. But evidently the last thing petitioners wanted was a service on or appearance by Cia Transmaritima.

7 Evidently the master of the CARIBE had protested to the Marshal the seizure of the CARIBE as the property of Cia Transmaritima and exhibited the ship's certificate of registry.

another levy and seizure of the vessel (T. 21) and she has ever since remained in his custody.

The amended libel, in a single paragraph, reiterates and re-alleges all the allegations of the original libel, stating that whenever "respondent" is mentioned, it refers to the respondent Cia Transmaritima. Par. I, T. 15. These incorporated allegations are the only allegations in either pleading which deal with the affreightment and loss on the CALI and constitute the only cause or ground for relief which is of admiralty cognizance. They are directed entirely against the respondent Cia Transmaritima. The additions of the amended libel are in Pars. II, III and IV, T. 15-16. They are, disregarding the wealth of conclusion, to the effect that since the filing of the original libel (on the previous day) the libelants had learned that on March 4, 1948, Cia Transmaritima had attempted to divest itself of its property, particularly the CARIBE, "in fraud of the libelants' rights", by a fictitious transfer of the ship to Cia Caribe, which was merely its creature or *alter ego* and, in furtherance thereof, it had caused the vessel to be registered in Colombia under the ownership of Cia Caribe. Alternatively, it alleged (Par. IV) that Cia Caribe was indebted to Cia Transmaritima for the full or a substantial part of the purchase price of the vessel. All these allegations were made upon information and belief only and each libel was verified upon information and belief by one of the local proctors for the petitioners.

The prayer of the amended libel, after praying for process and foreign attachment if the respondents could not be found, was, alternatively, that the CARIBE be attached in the hands of Cia Caribe as the property of Cia Transmaritima, "and/or" as the sole security for the agreed purchase price of the vessel, and that Cia Caribe be also made

a garnishee and cited to answer as to the debts, credits and effects of Cia Transmaritima in its hands.[8]

During the time of these proceedings, there was no judge in residence. The incumbent District Judge, Hon. Bunk Gardner, had left for the United States on March 5.[9] Canal Zone Admiralty Rule No. 23[10] provides a means for speedy summary relief against an improper or irregular attachment but, without a judge present, there was no expedient way to examine the propriety of the attachment or control the acts of the Court's ministerial officers.

On March 15, a verified claim as owner of the CARIBE was filed on behalf of Cia Caribe by the ship's Master. T. 23-4. A stipulation for costs, secured by a cash deposit of $250, was given by Cia Caribe's proctor (T. 24) and a motion was noticed for an order dismissing the libel as to Cia Caribe and vacating the attachment. T. 25-6. A supporting affidavit of the proctor was attached. T. 27-47.[11] The papers were mailed to Judge Gardner, then in

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8 The latter relief was allowed to the petitioners. The order appealed from required Cia Caribe to answer as a garnishee as to any funds, indebtedness, money or property which it owed or had in its hands, belonging to Cia Transmaritima. T. 114-16, Par. 4 on p. 116. This part of the order would have been complied with long ago if the petitioners had not appealed from the order and obtained a stay of its execution pending appeal. The District Court proceedings were thereby suspended.

9 He resigned his office on April 1st, 1948 (75 F. Supp. X), without ever returning to the Canal Zone. Judge Hancock, before whom the proceeding under review was had, was appointed at the end of June, 1948 (77 F. Supp. X), and took his bench some time later.

10 Text herein at p. 10.

11 The ground of the motion was primarily that the Court should decline jurisdiction of the entire cause as a suit between foreigners. T. 25-6, 48. The supporting affidavit, although partly factual and documentary, was principally an argument. T. 27-32.

Kentucky, who made a memorandum and order on March 31 that he had concluded that "the motion of respondents cannot be sustained at this time and on this showing" and ordered that the motion be overruled "without prejudice to the respondents filing any further motion that they may desire to file". T. 49-51. No reasons were given by the Judge,[12] who resigned his office on the day after giving the order.

On March 24, separate pleadings, denominated "Special Appearance and Exception to the Jurisdiction", were filed on behalf of each respondent. T. 48-49. Evidently these were not sent to Judge Gardner and were never passed upon by him or the successor judge.

After the overruling of the motion of March 15, the district remained without a judge for several months. Meanwhile, and on June 11, Cia Transmaritima appeared generally and answered the libels on the merits. It admitted the shipment and partial loss of the CALI's cargo, asserted its carrier's defenses and asked limitation of its liability, if any, in accordance with the United States statutes.[13] It denied all the allegations added by the amended libel, and alleged that at the time of institution of the suit, the CARIBE was not its property. T. 52-7.

On the same day, Cia Caribe appeared generally, answered the amended libel and filed exceptions to the interrogatories directed to it as garnishee. T. 57-60. The answer denied any connection with the affrightment and loss of the CALI's cargo, denied all the allegations of fraud in connection with the sale, denied that it was indebted to Cia Transmaritima therefor and alleged that at the time of the institution of the suit and of the attachments, the

[12] The "memorandum" suggested at T. 51 was never made.

[13] 46 U. S. Code, 183, *et seq.*

CARIBE was its property. The exceptions to the garnishee interrogatories were never brought on for hearing by either party and remain undetermined.[14]

Very shortly after Judge Hancock was appointed to the bench, the petitioners moved the District Court for an order for the sale of the CARIBE, *pendente lite*, on the allegation that she was deteriorating in custody. Cia Caribe then filed its notice of motion, with supporting affidavit, for the dismissal of the amended libel as to it and that the attachment of the CARIBE be vacated and discharged. T. 60-70. The two motions were noticed for hearing on the same day, August 23, 1948. The motion of Cia Caribe and the order pursuant to it vacating the attachment of the vessel are the proceedings now under review.

At the request of the petitioners, both motions were continued to August 30, upon which day they were argued and taken under submission by the Court. T. 71.[15] On September 20, the District Court rendered its opinion, embodying findings of fact and conclusions of law. T. 72-8. The opinion ordered that the levy of the attachment on the CARIBE be discharged and the vessel released, but Cia Caribe was held to answer as a garnishee as to any funds, indebtedness, money or property which it owed or had in its possession, belonging to Cia Transmaritima. Proctors were directed to prepare an order discharging the attachment of the vessel and otherwise conforming to the opinion. T. 77-8.

Petitioners moved for a rehearing (T. 80) which was elaborately argued, but the Court denied rehearing with

14 However, as heretofore stated, the District Court, in the order discharging the attachment, directed Cia Caribe to answer fully as a garnishee. See note 8, p. 6

15 The District Court made no order on the petitioners' motion for the sale of the vessel and did not mention the motion in the opinion.

an opinion, T. 107-13. The order appealed from (T. 114-16), was then entered.

Petitioners appealed to the Court of Appeals for the Fifth Circuit. That Court expressed grave doubts as to whether the order was appealable (T. 131), but, resolving its doubts in favor of its jurisdiction, it examined the proceedings on merit and affirmed, one Judge dissenting. T. 128-42. A petition for rehearing was denied. T. 153-57.

The matter is here on this Court's order of October 10th, 1949, allowing certiorari. T. 158.

Extracts from Applicable Statutes and Court Rules

Title 28, United States Code (Revised)

§1291. Final decisions of district courts.

> The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

General Admiralty Rules

(Promulgated by the United States Supreme Court)

Rule 2. Suits in Personam—Process In Arrest in Same.

> In suits *in personam* the mesne process shall be by a simple monition in the nature of a summons to appear and answer to the suit, or by a simple warrant of arrest of the person of the respondent in the nature of a capias, as the libellant may in his libel or information pray for or elect; in either case with a clause

therein to attach his goods and chattels, or credits and effects in the hands of the garnishees named in the libel, to the amount sued for, if said respondent shall not be found within the District. . . .

Canal Zone Admiralty Rules

(Benedict on Admiralty (6th Ed.), Vol. 5 (Recompiled), p. 234a)

Rule 23. Summary Release From Arrest or Attachment

In case of the attachment of property, or the arrest of the person (except in suits for seamen's wages when the attachment is issued upon certificate pursuant to Sections 4546 and 4547 of the Revised Statutes), the party arrested or any person having a right to intervene in respect of the thing attached, may, upon evidence showing any improper practice or a manifest want of equity on the part of the libellant, have an order from the judge requiring the libellant to show cause instanter why the arrest or attachment should not be vacated.

ARGUMENT ON THE APPELLATE JURISDICTION

POINT I

The order vacating the attachment was not final and therefore not appealable. The appeal should have been dismissed in the Court of Appeals.

The apprehension of the Court of Appeals as to its appellate jurisdiction (T. 131), was well founded. The order appealed from dealt only with the aspects of the provisional remedy of attachment. The merits of the cause remain with the District Court, undetermined. Even on the attachment aspects, the levy was vacated only as to the physical ship and was sustained under the alternate prayer of the amended libel that Cia Caribe be proceeded against as a garnishee. Nor did it vacate the attachment of the "gear, hoists, winches, etc., from the M. V. Cali" which the Marshal had found aboard the CARIBE and had levied upon. T. 11.

The generality that federal appellate jurisdiction does not exist except to review judgments and orders which determine final rights is not open to dispute. It applies to admiralty appeals. *Nyanza S. S. Co. Ltd.* v. *Jahncke Drydock No. 1*, 264 U. S. 43.[10] See also, *Schaefamsgraber* v. *Hamburg American Line*, 294 U. S. 454; *Bostwick* v. *Brinkerhoff*, 106 U. S. 3; *Macdicar* v. *Lindsay*, 60 U. S. 199.

The Court of Appeals assumed jurisdiction, despite its doubts, but it must be that if appellate jurisdiction did not exist under the statute, it was not assumable at discretion, however expedient its assumption may have appeared.

[10] Text, *supra*, p. 9.

We urged the lack of appellate jurisdiction in the Court of Appeals and deem it our duty to do so here.

It is settled by the decisions of this Court and many of the Courts of Appeals that orders vacating or refusing to vacate attachments in admiralty or at law are not final and are not appealable under the Federal statutory plan, even though appeals from such orders are authorized by the statutes or decisions of many states.

This specific application of the rule was made by this Court in the admiralty case of *Cushing* v. *Laird*, 107 U. S. 69, 76, affirming a Circuit Court decision to the same effect (6 Fed. Cas. No. 3510, pp. 1043, 1050). The precise issue there was the question whether funds levied upon in the hands of a garnishee were the property of the admiralty respondent or of a stranger to the litigation. The garnishee admitted the possession of the funds designated in the writ but asserted in the garnishee return that they were the property of the stranger. That issue was determined *pendente lite*, the District Court deciding that the funds belonged to the admiralty respondent and directing their payment into Court. The garnishee appealed from that order. Thereafter judgment was taken against the respondent, who had never been served and had not appeared, and the funds in the possession of the garnishee were ordered applied in satisfaction of the judgment. The garnishee also appealed from the second order. On the appeal to the Circuit Court it was held that an appeal did not lie from the order *pendente lite* because it was not final or determinative of ultimate rights and that the second order was final and appealable. Reviewing the second order, the Circuit Court reversed, finding and holding that the attached funds were not the property of the admiralty respondent and belonged to the stranger. On appeal to this Court, the Circuit Court's decisions were affirmed; the appeal as to the determination and order

pendente lite being dismissed (107 U. S. 69, at p. 76), and the reversal of the final order affirmed.

There are many cases at law involving appeals from orders vacating or refusing to vacate attachments and the following authorities are to the effect that, whether the *ad interim* order sustains the attachment or vacates it, the order is not final or appealable: *Leitensdorfer* v. *Webb*, 61 U. S. 176, 185; *Crooker* v. *Knudsen*, C. A. 9, 232 Fed. 857-8; *Assets Collecting Co.* v. *Barnes King Development Co.*, C. A. 2, 209 Fed. 206; *Atlantic Lumber Co.* v. *L. Bucki Lumber Co.*, C. A. 5, 92 Fed. 864; *Hammer* v. *Scott*, C. A. 8, 60 Fed. 343.

In the courts below, these petitioners cited various cases involving admiralty proceedings *in rem* where the ship proceeded against was the sole respondent. Of course, orders or judgments dismissing such a ship from arrest prior to adjudication of the merits are final and complete, for the effect is to dismiss the only respondent without day. Such a case is *The Pesaro*, 255 U. S. 216. Cases in this category are not comparable to the case at bar or those above cited where the ship or property attached was not proceeded against *in rem* but by attachment in aid of an *in personam* suit against a personal respondent who is left in court with ultimate rights against him undetermined. This Court noted the distinction in *Nyanza S. S. Co. Ltd.* v. *Jahncke Drydock No. 1, supra.*

It was also argued below that even though the District Court had found no attachable interest of the respondent Cia Transmaritima in the attached ship CARIBE the order was nevertheless appealable because her owner, Cia Caribe, had been joined as a respondent and the order in effect, if not in terms, operated to dismiss the amended libel as to Cia Caribe and put it out of the case, except as a garnishee. It is true that the motion of Cia Caribe asked dismissal of the amended libel as to it and the Dis-

trict Court's views were that no cause of action within the jurisdiction of admiralty had been stated against Cia Caribe. But neither the opinion nor the order appealed from directed the dismissal of Cia Caribe as a respondent and it is apparently still before the District Court on its general appearance, subject to the court's jurisdiction. However, even if the order appealed from, aided by anything in the opinion of the District Court, can legitimately give the order the effect of finally dismissing the cause as to Cia Caribe, it still remains an *ad interim* order and not subject to an appeal. It leaves the co-respondent Cia Transmaritima, sued on the same liability, before the Court with its and the petitioners' ultimate rights still undetermined. In such a situation the decisions of this Court in *Nyanza S. S. Co. Ltd.* v. *Jahncke Drydock, No. 1, supra* and *Hohorst* v. *Hamburg American Packet Co.*, 148 U. S. 262, teach that the final dismissal of one or more respondents sued jointly is not an appealable order as long as any other respondent remains before the Court and the ultimate rights of the suitor remain undetermined. The *Hohorst* case has been followed consistently in the circuits down to the present time. The most recent case applying it, of which we have note, is *Romão* v. *Keyes*, C. A. 2, 170 F. (2d) 310, decided in October, 1948.

Applying these principles and authorities to the situation at bar, it would appear that there was no jurisdiction in the Court of Appeals to review the order appealed from and that the appeal to the Court of Appeals should have been dismissed by it. It is suggested that this Court should go no further with the case, here pursuant to its writ, than to determine the absence of appellate jurisdiction and remand the cause to the Court of Appeals with instructions to dismiss the appeal.

ARGUMENT ON THE MERITS

POINT II

The attachment was properly vacated because of a complete failure of proof of the right of petitioners to maintain it.

This point is not met by any of the four specifications of error which were urged for the granting of the writ and which, stated in somewhat different form, are now urged for reversal. One presentation of it will suffice without reiteration of it in the subsequent discussions of petitioners' points.

On any theory or approach to the case, it is inherent that the only liability asserted is the carrier's liability of the respondent Cia Transmaritima. It follows that any right to the provisional remedy of attachment under General Admiralty Rule No. 2, exists only as to things in which, at the time of the levy, that respondent had some *property* interest, legal, equitable or otherwise.

Petitioners' theory as pleaded and presented is that, although there was a sale of the CARIBE by Cia Transmaritima before the jurisdiction of the District Court attached, there remained in Cia Transmaritima, at the time of the levies, a latent equitable interest, reachable by them because of alleged fraud against them in the inception and accomplishment of the sale. That theory, if tenable in law to support an attachment, required factual proof.

The verified claim of Cia Caribe, as unqualified owner of the attached vessel, raised a square issue of *fact* as to the existence of any sort of property right in the vessel in Cia Transmaritima. The motion to vacate the attach

ment brought up that issue for determination by the District Court and put petitioners to their proof that Cia Transmaritima had *some* sort of attachable interest in the CARIBE.

The petitioners offered no proof! They made no showing in *any* form or upon *any* theory that Cia Transmaritima had any right, title or interest in the CARIBE, legal or equitable. They made no offer of evidence in any form in support of their allegations of fraud, equitable title or equitable lien or to show any infirmities of any kind in the asserted absolute title and ownership of the vessel in Cia Caribe. They were not barred or limited by any objection or ruling of the Court from adducing evidence to show an attachable interest according to any theory upon which they wished to proceed, however untenable and however fantastic their theories might be.

Their essential position at the hearing was and still remains that they were entitled to maintain the levy on the ship on the bare, unsupported allegations and assertions in their libels and prayers, and that the burden of proof of *negativing* an attachable interest in Cia Transmaritima was on Cia Caribe.[17]

That position is wrong. The burden of proof on the right to maintain the attachment was strictly upon the petitioners who asserted the right and the Court of Appeals so held. T. 132.

This Court's decision on the merits in *Cushing* v. *Laird*, 107 U. S. 69, 83-4,[18] sustains the Court of Appeals. The issues there were strictly the issues of ownership of property (funds admittedly held by garnishees) attached in an admiralty cause, pursuant to General Admiralty

17 See Petitioners' brief, Caption of Point 4) p. 21 and ensuing discussion at pp. 23-5, particularly the third full paragraph on p. 25.

18 Cited also in connection with our Point I, *supra*, p. 12.

Rule No. 2, as the property of the admiralty respondent. The garnishees answered, asserting that the funds belonged to a third party. This Court held:

> "The libellants, in this suit against Laird [the admiralty respondent] personally, and against Foster & Thomson as his garnishees, *have the burden of proving that the fund in the hands of the garnishees belongs to Laird.* There is nothing in the acts of Prideau, [the third party] or of the garnishees as his attorneys, which estops the garnishees to deny that fact *and to put the libellants to proof of it.* • • • There being no estoppel, either of record or in pais, *the libellants fail to prove that the fund belongs to Laird, and cannot therefore maintain their attachment.*" [10]

The District Court's order vacating the attachment of the ship was unqualified and unlimited (T. 115) and recited that the libelants had offered no proofs other than the allegations of their libels. T. 114. In affirming the order, the Court of Appeals held that there had been a complete failure of proof and that was the essential basis of the affirmance. It said:

> "If the respondent has any interest in her it must be an equitable one or one arising from unpaid purchase money; and after the lapse of a year no evidence has yet been put into this record that there is any such interest. The vessel when seized was not in the possession or service of respondent, and the burden is surely on libelants to show a justification for her

[10] Emphasis throughout is ours.

seizure. * * * Neither on the hearing, nor on the rehearing completed September 20, 1948, more than six months after seizure, have libelants proved anything at all to support their contention, alleged on information and belief only, that the vessel is really the property of respondent Compania Maritima. As a summary remedy the motion to vacate was properly sustained. There is, however, no adjudication of the title." T. 132-3.

In short, the situation of the petitioners at the conclusion of the proceedings in the District Court was that of a plaintiff on a trial of issues of fact who sits silent and declines to offer proof in support of an alleged right.

It is indisputable that on a controverted issue of fact, allegations of fact in a pleading, however forcefully expressed, are not proofs unless unqualifiedly admitted. *The Naveman*, 303 U. S. 68, 75.[21]

We naturally thought from the petitioners' amended libel that they would probably endeavor to show at least *some* facts in support of some legal or equitable property interest of Cia Transmaritima in the CARIBE. We could only anticipate, from the amended libel, something in the nature of a collateral attack on the safe for fraud against these petitioners. So anticipatory proofs tending to negative the alleged facts were included in the supporting

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20 Sic. The motion for rehearing was argued October 11 and decided November 5. September 20 was the date of the decision on the principal motion. T. 78.

21 Compare the view of the dissenting judge (T. 140-41), to the effect that the fact that petitioners charged a fraudulent transfer did not make it incumbent on the libelants to "prove their case by their pleadings." Neither did it *entitle* them to do so. The issue of fact on the attachment was collateral to any issue on the merits of the cause.

affidavit. Had proofs been offered along that line by the petitioners we should have objected to their competency, sufficiency and materiality on jurisdictional grounds. If, on evidence offered by the petitioners, the Court had excluded it on jurisdictional grounds, a consideration of jurisdiction might have been necessary on the appeal to sustain the order. But as the petitioners offered *no proofs whatsoever*, our points of law as to lack of jurisdiction and substance have no target except the pleading itself.

The District Court did hold, incidental to the vacating of the attachment, that except for the admittedly valid maritime cause of action against Cia Transmaritima for cargo damage, the amended libel stated no grounds for relief cognizable in a court of admiralty. That determination was sound, as we shall hereafter urge, but the inferences in the petitioners' presentation and in the opinions of the dissenting judge, that those matters of law were determined *in advance* to cut off the petitioners' opportunities to present evidence upon their chosen theory, is contrary to the facts. The District Judge did not give his ruling on the jurisdictional points until weeks after the hearing nor did he make any effective order discharging the attachment until after the petitioners had exploited all the possibilities of their case on their application for a rehearing. At no time did they offer to present evidence.

It is suggested in this Court, for the first time in the case, that the petitioners' counsel were given only a few days notice of the hearing on the motion to vacate and had no reason to believe that supporting evidence would be necessary. Alternatively, they suggest that they did not offer evidence on the motion because a previous motion to vacate had been made and had been denied by the predecessor judge and it "seemed inconceivable" that the

incumbent judge would "disregard that ruling."[22] We cannot speak for counsel's state of mind or their conceptions or misconceptions of the requirements of their case. But as far as the Court and counsel for the respondent were concerned, petitioners were afforded all the opportunity for a fair hearing and full presentation of their evidence that they appeared to want.

It is also said that the garnishee interrogatories attached to the amended libel and directed to Cia Caribé (T. 18) were not required to be answered by it prior to the entry of the order vacating the attachment of the ship (Brief, p. 9), and that those interrogatories were "aimed at obtaining, under direct oath of the respondent's officers, evidence in support of the libelants' (fraud) charges." Brief, p. 5. Cia Caribe had excepted to the interrogatories

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22 Petitioners' Brief, pp. 7-8, and note 29, p. 7. The noticed date for the hearing, August 23 (T. 61), was selected by Cia Caribe's proctors because petitioners' proctors had noticed their motion for an interlocutory sale of the CARIBE for the same date. The motion papers on the motion to vacate the attachment were served and filed August 16. T. 63, 70. Petitioners' local proctors asked for a continuance until August 30 to give them time to communicate with their associates at New Orleans. Cia Caribe's Canal Zone proctor said that Cia Caribe would consent to the continuance if petitioners' proctors would agree to continue the motion for a sale to the same date. *That was refused.* After hearing both sides on the question of a continuance the Court set down both motions for hearing on August 30, two weeks after service of the motion papers on the motion to vacate. See T. 71. Upon conclusion of the hearing on August 30, Cia Caribe's New York proctor offered to remain in the Zone if any further proceedings on the motion were in contemplation. Counsel for petitioners replied that there was no necessity. Thereupon both sides rested and the motions were submitted for decision. T. 71. The motion to vacate was not decided until September 20 (T. 78). On October 6, petitioners moved for a rehearing on nine grounds (T. 79-80), none of which had anything to do with any desire on petitioners' part to introduce evidence. The motion was heard October 11 (T. 82) and denied November 5. T. 113.

(T. 59) which abated any duty to answer them until disposition of the exceptions. If the petitioners had to obtain the sources of evidence to support their case from Cia Caribe, they had only to advise the District Court and move the exceptions for summary determination. They did not suggest at any time until now that answers to the garnishee interrogatories were in any way necessary to a presentation of their case for maintaining the attachment on the ship.[23]

These afterthought suggestions of the petitioners cannot supply the essential defect in their case to maintain the attachment—the absence of any proof of right on any conceivable theory of right.

The petitioners' brief makes repeated references to the extraneous material appearing in this record at T. 83-106 and to the comments thereon by the dissenting judge. T. 140. It is said that this material was "introduced" and "offered" (Brief, pp. 6, 8) by the libelants as proof. Actually it was filed arbitrarily *after* the hearing and submission of the motion for rehearing with the petitioners' *reply* brief thereon. See T. 82-3. It was not offered as evidence or received in evidence. No leave to offer it was sought or granted. A copy of it was not even *served* on proctors for Cia Caribe, who had no opportunity to object to it or comment upon it. The District Court

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23 At the time of the hearing the essence of the interrogatories had been answered by allegations and denials in the pleadings of both respondents (T. 52-9) and the affidavits of Charles E. Ramirez in support of the motion (T. 27-47; 63-70). These documents disclosed upon oath that Cia Caribe claimed unqualified title to the ship by sale, where and how the sale was accomplished, the absence of any indebtedness on the purchase price, the names of the officers, directors and stockholders and their holdings in the two Colombian companies. If the petitioners needed more than that to make a case for their attachment, the whole of the liberal admiralty process for discovery was available to them. See General Admiralty Rules Nos. 31 to 32 D, inclusive.

denied the rehearing on November 5. T. 143. The first suggestion of an attempt to include this material as a part of the record was in petitioners' praecipe for appeal. T. 123, 125. We immediately noted our protest. T. 126-7. We repeated the protest in our brief in the Court of Appeals but the device of thus attempting to make a record "*vi et armis*" seemed so obviously improper that we did not make a formal motion to strike it from the record. However, the dissenting judge appears to have taken its presence in the record as indicating that it was validly admitted or offered. In any event, the material had nothing whatsoever to do with the ownership of the CARIBE. The majority judges saw it in its true light, holding and reiterating in the opinion denying rehearing that *no* proof of ownership in Cia Transmaritima had been made. T. 132, 154.

The Court of Appeals held that the petitioners had failed to *prove* any right to attach the CARIBE for the alleged debt of Cia Transmaritima. We cannot conceive how the soundness of that can be open to question and that was everything which was necessary to justify the order to vacate.

POINT III

There is no jurisdiction in admiralty to trace and apply assets after the manner of a creditor's bill and an attachment which must be so worked out is not sustainable.

This point is in answer to the petitioners' specification of error No. 1 and its Point A for reversal (Brief, pp. 12; 14-17).

In considering this aspect of the case, the distinction must be observed between *absence* of jurisdiction as to subject matter and the *existence* of such jurisdiction which a court has discretion to *decline* on account of the foreign character of the parties and the transaction. Petitioners have never seemed able to grasp the distinction. In their application for the writ, they confused the two matters completely; in their present brief they purport to separate them but their specification No. 1 and Point A still seriously confuse the two.[24]

The foreign character of the transactions and parties has nothing whatsoever to do with subject matter jurisdiction and its limitations. The absence of such jurisdiction would be just as vital a defect if all the parties had been United States citizens, the ship a United States ship and the sale a domestic transaction.

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24 The jurisdiction which the Court of Appeals characterized as "doubtful" was jurisdiction of subject matter. T. 133, par. 3. In the concluding sentence of the same paragraph it said that "even if there be jurisdiction" (of subject matter) there was a discretion to *decline* it. Neither point was definitely decided by the Court of Appeals nor were those points necessary to a decision on the appeal. Point II, *supra*. On the petition for rehearing, the Court of Appeals explained that it had only held that the supplementary libel *might* be dismissed for discretionary reasons. T. 154; Petitioners' Brief, p. 14, n. 2.

No one has ever disputed that the cause of action for damage to cargo was maritime and was of admiralty cognizance. Both of the Courts below have properly so held. The District Court probably had discretion to *decline* jurisdiction of it as a foreign transaction, but did not do so.[25] That cause, upon which only the carrier respondent could be liable, is still pending and undetermined in the District Court. The jurisdictional vice inherent in this case is that the petitioners, by their *amended* libel, endeavored to engraft upon their maritime cause allegations of fact which deal with a strictly non-maritime subject matter and sought relief which a Court of Admiralty has no jurisdiction to afford. They sought to make a collateral attack for fraud upon the sale of an uninvolved ship, made long after the maritime liability, if any, arose. They prayed that the vendee, Cia Caribe, be held liable for and its property be applied in satisfaction of the maritime liability of its vendor.

Petitioners assert (Brief, p. 15), that this controversy as to the transfer of the ship is only incidental to the main issue for negligent loss of cargo. *That* is certainly true. But no one could possibly mistake the essence of it as a cause to trace and apply assets after the manner of a creditors' bill in equity. That is a cause and a remedy unknown in the admiralty.

Implicit in the amended libel is the proposition that a sale of the ship *was* made to Cia Caribe but attained by a fraud to which it was a party and of which Petitioners are entitled to complain. They would have those things and the nullity of the sale adjudged, meanwhile resorting to attachment to sequester the ship and apply it ultimately in satisfaction of the judgment they hope to obtain against the vendor. Any

25 This was asked and denied without prejudice in the earlier proceeding determined by Judge Gardner.

such application of the attached ship could only follow a substantive judgment against Cia Caribe that it had been a guilty participant in the allegedly fraudulent transfer. Unless an Admiralty Court has jurisdiction to make such a judgment, it has no power to afford the provisional remedy of attachment in anticipation of it. It cannot be doubted that a suitor may not have the provisional processes of admiralty in aid of a judgment which is beyond its jurisdiction to render.

The inherent lack of jurisdiction in the admiralty to deal with non-maritime controversies or to afford remedies peculiar to other systems such as law or equity or those now combined systems, is elementary.

In *The Eclipse*, 135 U. S. 599, the libelants and intervenors claimed the right to possession of a ship as against the holders of the legal title. Their rights were severally asserted as beneficiaries of an express trust and as purchasers under an unexecuted contract of sale. This Court held that the rights asserted and remedies sought were equitable and not within the cognizance or powers of an admiralty court. It said (at p. 608):

> "So far as the creditors and intervenors were concerned, if the former desired to wind up the trust, or the latter to enforce an alleged contract of sale, which is indeed what is asked by this intervention, they should have resorted to a different tribunal. While the Court of admiralty exercises its jurisdiction upon equitable principles, it has not the characteristic powers of a court of equity. It cannot entertain a bill or libel for specific performance, or to correct a mistake, *Andrews* v. *Essex Ins. Co.*, 3 Mason, 6, 16; or declare or enforce a trust or an equitable title, *Ward* v. *Thompson*, 22 How. 330; *The Amelia*, 6 Ben. 475; *Kellum* v. *Emerson*, 2 Curtis, 79; or exercise jurisdiction in matters of

account merely, *Grant* v. *Dodlou*, 20 How. 162; *Minturn* v. *Maynard*, 17 How. 477; *The Ocean Belle*, 6 Ben. 253; or decree the sale of a ship for an unpaid mortgage, or declare her to be the property of the mortgagees and direct possession of her to be given to them. *Bogart* v. *The John Jay*, 17 How. 399. * * * There is nothing maritime about the claims of the intervenors, and the intervention was properly dismissed for want of jurisdiction over the subject matter."[26]

The rights here asserted by petitioners and the remedy sought by them are as purely equitable and non-maritime in character as anything discussed in *The Eclipse*.

The same kind of rights and remedy were involved in *Yone Suzuki* v. *Central Argentine Ry. Co.*, C. A. 2, 27 F. (2d) 795, affirming 19 F. (2d) 645, 1927 A. M. C. 678, 692; cert. den. 278 U. S. 652. The suit was in admiralty for ship demurrage under charter parties and was clearly maritime in character. Ultimate liabilities for the demurrage were asserted *in personam* against Gano Moore Co., the charterer of the ships, and Gano Moore Coal-Mining Co. The latter was a successor company to Gano Moore Co., had been incorporated subsequent to the accrual of the liability of Gano Moore Co. and had succeeded to the business and assets of that company by subsequent transfers. It had been impleaded in the suit as a co-respondent with Gano Moore Co. upon allegations of those facts and the claim was that it was merely the "dummy" or "alter ego" of Gano

[26] These limitations upon the jurisdiction and remedies available in the admiralty are referred to in many subsequent decisions of this Court. See *Detroit Trust Co.* v. *The Barlum*, 293 U. S. 21, 32, regarding the absence of jurisdiction to deal with ship mortgages (except preferred mortgages where the jurisdiction is given by statute); and *Red Cross Line* v. *Atlantic Fruit Co.*, 264 U. S. 109, 123, to the effect that admiralty lacks power to grant equitable relief. Both cases cite *The Eclipse*, *supra*.

Moore Co. On that account it was charged with liability for the demurrage. Judgment was given against Gano Moore Co. but denied against its successor.

The District Court,[27] held:

> "Gano Moore Coal Mining Company, Inc. was not organized until 1922 and not until after the charter parties were entered into by Gano Moore Company. The questions whether or not the assets of Gano Moore Company were fraudulently transferred to Gano Moore Coal Mining Company, Inc. and whether or not Gano Moore Coal Mining Company, Inc. is Gano Moore Company in disguise, and whether for that or any other reason Gano Moore Coal Mining Company, Inc. is liable for the debts of Gano Moore Company, *do not involve any maritime relations and are questions which are peculiarly cognizable by a court of equity or a court of law.* These suits are distinguishable from those referred to by the respondent [the consignee which had impleaded the Moore companies] in which there was no controversy as to any of the material facts establishing one corporation to have been a dummy for another *at or before the time liability arose.*"

Affirming the District Court, the Court of Appeals[28] held:

> "It is contended that Gano Moore Coal-Mining Company, Inc., ought to be held directly liable for the obligations of Gano Moore Company. Courts of admiralty have held corporations which owned and controlled

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27 S. D. N. Y., Bondy, J., 19 F. (2d) 645, 653, 1927 A. M. C. 678, 692. The quoted part is from the A. M. C. report as the corresponding passage in the Federal volume is garbled by the printer.

28 27 F. (2d) 795, 800. Opinion by Judge Augustus N. Hand.

others liable for the latter's acts. Luckenbach S. S. Co. v. W. R. Grace & Co., C. C. A., 267 F. 676; The William Van Driel, Sr., C. C. A., 252 F. 35. This was because the controlled companies were mere dummies or agents. But *Gano Moore Coal Mining Company was not acting as agent or dummy for Gano Moore Company when the claim for port demurrage arose. The former company did not then even exist, and no liability based on agency or any kind of representation can be worked out.*

"It seems pretty apparent from the evidence that the stockholders of Gano Moore Company divided all its quick assets and then incorporated Gano Moore Coal Mining Company, Inc., for the purpose of succeeding to the good will of the former company and embarking on a stock-jobbing career. In addition to its other activities, it did a business of buying and selling coal like the original company. *But no liability for the debts of Gano Moore Company can be worked out that is not based on property received from the former,* and that property, so far as disclosed, was largely, if not entirely, good will. *The liability of Gano Moore Coal-Mining Company must depend upon the extent of the value, if any, of the property transferred to it.* Okmulgee Window Glass Co. v. Frink, C. C. A., 260 F. 159. *We are referred to no case where a remedy to reach and apply assets, ordinarily afforded only by a creditors' bill, has been applied by a court of admiralty. It seems quite foreign to its jurisdiction, and we hold that such relief cannot properly be granted in this suit.*"

In *The Melmay*, D. C. Canal Zone, 1932 A. M. C. 1396,[29] resort was had by suitors to the identical device used by

[29] Not reported in "Federal".

petitioners here. The libelants were underwriters suing as subrogates or assignees of the owners of cargo shipped on a vessel which was totally lost. They went to the Canal Zone and lay in wait for the ship *Melmay* to make the passage of the Canal. That vessel was owned by a different carrier corporation which was created subsequent to the loss, but it was alleged to be the successor or "alter ego" of the original carrier and liable as such. The alleged facts behind this theory were that the ultimate beneficial ownership in the two corporations was in an individual stockholder, common to both, and that the *Melmay* had been built in whole or part with the proceeds of hull insurance paid for the loss of the ship which had carried the libelants' cargo. A levy of foreign attachment under General Admiralty Rule No. 2 was obtained and levied upon the *Melmay* when she was making her transit of the Canal. It will be observed that the theory of the libelants there was the exact parallel of the theory of these petitioners.

The *Melmay* owners twice moved to vacate the attachment. The first motion raised points going to the regularity of the levy and was denied by the District Court. This opinion was eventually reported in 1933 A. M. C. 1057. After denial of the first motion, the *Melmay* owners made a second motion challenging the subject matter jurisdiction and the power of the Court to sustain any sort of attachment in aid of it. This motion was granted; the vessel was released and the case was not carried further.

We shall not attempt to examine in detail the long opinion of the District Court. It was laid upon these two points, paralleled in the *Yone Suzuki* case (*supra*) and in the case at bar:

1932 A. M. C. 1396.

(1) There was nothing in the pleading or evidence on the hearing to render the *Melmay's* corporate owner liable on the maritime cause of action. The bare fact that it did not exist at the time liability accrued precluded any possibility that it had participated as an *alter ego*, "dummy" or agent for the carrier respondent.

(2) Assuming that the libelants were substantively entitled to trace assets of the carrier respondent into the hands of the *Melmay's* owner, they were not in the proper forum to do it, since a court of admiralty had no jurisdiction to adjudge such equities or give a remedy because of them. On that account the attachment was vacated.

In deciding the jurisdictional question here at bar, the District Court squarely followed *The Eclipse*, *Yone Suzuki* v. *Central Argentine Ry.* and *The Melmay*. Even if it had rested the vacating of the attachment upon that single ground, the decision would have been unassailable. The Court of Appeals did not determine the question, holding rightly that there had been no showing of a right to maintain the attachment upon any theory, admiralty or non-admiralty. It did say, in passing the question, that such admiralty jurisdiction was "doubtful" and it believed that there was no precedent for it. T. 133.

As to this, the petitioners appear to agree.[31] They make no effort to meet the jurisdictional defect except by reiterating that an admiralty court certainly has the right to inquire whether attached property "belonged to the respondent" and urging that the cases of *Gardner* v. *Dantzler*, C. A. 5, 98 F. (2d) 478, and *Lee* v. *Thompson*, Fed. Cas. No. 8202, are so closely analogous on holdings and dicta as to constitute precedents in favor of the jurisdiction.[32]

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[31] Brief, p. 10, second full paragraph.

[32] The Court of Appeals pointed out the distinctions in these cases. T. 133.

Gardner v. Dantzler was a suit *in personam* for cargo loss against two brothers. The solvent brother had put title to the ship in the insolvent brother and conducted business in the latter's name. In that manner he made and undertook performance of the contract of affreightment which resulted in the loss and, when sued on it, tried to avoid by claiming that the owner and contracting party was his insolvent brother. This was a true case of *alter ego* or dummy relation, inherent in the maritime liability. Essentially the case was the same as *Luckenbach S. S. Co. v. W. R. Grace & Co.*, C. A. 4, 267 Fed. 676, and others which were referred to and distinguished in the Court of Appeal's opinion in the *Yone Suzuki* case, *supra*.

Lee v. Thompson was a supplementary proceeding in aid of a writ of execution issued upon a final judgment in admiralty. An issue of fraudulent transfer of property levied upon was tried in that proceeding in the admiralty court. The authority relied upon to do it was former General Admiralty Rule No. 21 (now Rule No. 20) and the civil law practices in Louisiana. Rule 20 deals only with writs of execution on a final admiralty decree for the payment of money. In addition to the writ, the rule provides that: "Any other remedies shall be available that may exist under the State or Federal law for the enforcement of judgments or decrees."

It is a far stretch of imagination to find analogy in a permission to resort to state practices under Rule 20 for the enforcement of a final judgment and an attachment *in limine* under General Admiralty Rule No. 2 which gives no corresponding permission.[38]

[38] The Court of Appeals suggested that *after* final judgment and pursuant to the permissions of Rule 20, the admiralty court probably could, like a court of equity, seek out and condemn equitable assets in aid of its writ. T. 133. The proposition is in no way involved in

The petitioners in Point A, and elsewhere, appear to suggest that the sale of the CARIBE was in some sense in purposeful flouting of the prospective jurisdiction and process of the District Court. That is totally fantastic. The sale was made in foreign parts, between foreign non-residents of the district and dealt with property which had no situs in the District. It was fully accomplished before the District Court's jurisdiction was ever invoked and before anyone but the petitioners knew it *would be invoked*. The petitioners had no "right" to attach anything unless and until there should be concurrence *in* the District of all the conditions of General Admiralty Rule No. 2—the filing of a libel on the maritime cause, inability to find the maritime respondent and a valid levy on *its* property. In view of the common nationality of the shipper and carrier and the constant availability of Cia Transmaritima to be proceeded against in the country of its residence, the Canal Zone was the last place in which it should have been sued.

It is submitted that the lack of subject matter jurisdiction was fatal to the controversy and relief sought in the amended libel and to the maintenance of the attachment. That alone justified the vacating of the attachment.

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this case, but that seems to us a suggestion open to very grave doubt. The admiralty court does not acquire non admiralty jurisdiction because it renders a final decree and running its executions against latent or other equitable interests would necessarily require it to determine the existence of such equities, perhaps even against a non-maritime owner. That would be an indirect exercise of a jurisdiction which admiralty does not have. But no doubt the desired result could be accomplished by suing on the admiralty court's judgment in any court of general jurisdiction and asking for equitable relief.

POINT IV

The District Court was justified in declining jurisdiction of the controversy tendered in the amended libel on discretionary grounds.

This point is addressed to petitioners' Specification No. 2 and Point B, Brief, pp. 12-13; 17-20. We assume, argumentatively, the existence of subject matter jurisdiction, contrary to our position as taken in the foregoing Point III.

It is not disputed by petitioners that if it were not for the alleged United States citizenship of one libelant, Swift & Company, Packers, the District Court would have been fully justified in declining, as a matter of discretion, any aspect of the case, even the maritime cause of action. They insist, however, that the presence of this one citizen libelant bars the Court from the exercise of that discretion and gives the libelants an *absolute right* to have their cause heard and determined in all respects in the District Court.

Preliminarily, it should be pointed out that there is no *proof* as to the citizenship or interest of the libelant Swift. There are allegations in both libels that Swift is a Nevada corporation and that it "became the owner" of portions of the rice before loss. On exceptions or a motion addressed only to the sufficiency of the pleadings, those allegations might properly be taken as true, but on the motion to vacate an attachment, the *facts* are put in issue and everything necessary to sustain the libelants' right must be *proved*. *Cushing* v. *Laird*, 107 U. S. 69, 83-4. The twelfth ground of our motion expressly re-asserted the denials of the answers as to Swift's citizenship and interest.

But without waiver of the absence of factual proof, we will assume, with petitioners, that Swift was a citizen of

the United States and acquired a *bona fide* ownership in the rice prior to loss, presumably by a transfer of title and the bills of lading from the foreign shipper, Noboa. Upon that assumption we have the presence of one citizen libelant, in a transaction otherwise entirely foreign to the commerce of the United States, suing upon rights derived entirely by assignment or transfer under a contract made by a foreigner with a foreigner—rights which were patently acquired in the citizen libelant's *foreign* business. No greater or different substantive rights are asserted for Swift than are asserted in the same libels for the shipper, Noboa. The cases for the foreign shipper and the citizen and other foreign libelants are identical.

The narrow question is whether, under these circumstances, discretion in the District Court to decline jurisdiction is barred and the District Court compelled to hear and determine the case because the citizen libelant has an absolute right that it do so.

Petitioners admit frankly that they have no authority holding that there *is* no discretion to decline jurisdiction. Brief, p. 19. Neither have we any square authority where the citizen libelant was a transferee of the title and documents. We do have strong authority for the proposition that where the rights of a citizen libelant are derived from a foreign shipper, his citizenship alone does not give an absolute right to resort to the United States courts of admiralty and discretion to accept or decline jurisdiction remains with the District Court in like manner as when the suit is maintained by the foreign shipper. That has repeatedly been held in cargo suits brought by citizen underwriters as assignees or subrogates of foreign shippers.

The leading and most exhaustively reasoned authority we have found is *United States Merchants & Shippers Ins.*

Co. v. A/S Den Norske, etc., C. A. 2, 65 F. (2d) 302.[34] The voyage there was from Norway to China, the shipper Dutch, the carrier and ship Norwegian. The citizen underwriter paid the cargo loss and brought suit in the Southern District of New York. On motion, the respondent asked the District Court to dismiss at discretion on account of the foreign character of the affreightment and the parties to it. The District Court held that the overall balance of convenience was greatly in favor of a Norwegian tribunal and dismissed the cause, despite the citizenship of the libelant. The Court of Appeals held that unless the American libelant could sue in the District Court *as a matter of right*, because of its citizenship, the District Court had discretion to retain or decline jurisdiction which was not reviewable except for abuse. The Court then held that when a citizen's interest is derived from a foreign shipper, the generality of the citizen's right to resort to United States admiralty courts is to be qualified by considerations of circumstances and convenience. It was pointed out that a holder of derivative rights acquires and takes them voluntarily and for his own advantage; that insistence upon trial in a United States forum may be and often is an additional burden upon the foreign carrier not contemplated by the contract—one which may impair or even cut off his defenses and one which the foreign shipper could not insist upon imposing. The conclusion and holding was that the

34 Opinion by Judge Learned Hand.

35 *The Tricolor*, 1 F. Supp. 934.

36 The statement in the dissenting opinion that the respondent "knew or should have known" that it was dealing with Swift, a citizen of the United States (T. 53, 54. Brief 19) is unsupported. Swift's name never appeared in the affreightment transaction except as a name and address to be notified upon the arrival of the CALI in Cuba. T. 33-36. There was nothing as to its citizenship or its present or prospective interest, if any.

citizen's right of resort to admiralty courts is not absolute and it was for the District Court to determine whether the jurisdiction was to be retained or rejected. The order dismissing the cause was affirmed.

To the same effect are *Whittig* v. *Canada S. S. Lines*, W. D. N. Y., 59 F. (2d) 428; *Insurance Co. of North America* v. *British India Co.*, E. D. La., 38 F. Supp. 47, and, in England, *La Societe du Gaz* v. *Armateura Fraycais*, H. of L., 23 Lloyds List L. R. 209.

In the instant case, all considerations of convenience of the Court and of justice to the foreign respondents militated against a trial of their rights in the United States Court; particularly on the aspect which attacked the validity of the CARIBE's sale. That was a Colombian transaction involving Colombian law—perhaps the legal effect of Colombian documents. All witnesses to sustain the respondents' case are non-residents and it is doubtful if competent evidence could be obtained from Colombian officials without resort to letters rogatory. The petitioners, however they acquired their rights to sue, voluntarily involved themselves in a foreign contract of affreightment with a known Colombian carrier.

We submit, therefore, that the District Court, other considerations aside, did not abuse discretion and was justified in divorcing the maritime and non-maritime aspects of the case and in rejecting, if it had any, its jurisdiction to proceed with the latter.

Petitioners infer that jurisdiction, if discretionary, should have been retained because (1) the CALI's bills of lading incorporated the provisions of the United States Carriage of Goods by Sea Act[37] and (2) because, in its answer on the merits, Cia Transmaritima claimed the benefit

37. 46 U. S. Code 1300, *et seq.*

of the United States limitation of liability statutes. As to the latter, *any* shipowner, citizen or foreigner, is entitled to make a case for limitation of its liability and to pursue remedies available in the forum of suit to give it effect. As to the former, the effect of making the Carriage of Goods by Sea Act a part of the contract of affreightment could only be of concern in the maritime cause of action which is not involved here and as to which the District Court *retained* jurisdiction. The Act has nothing whatsoever to do with the sale of the CARIBE or the rights asserted in the additions in the amended libel or the validity of the attachment.

Any suggestion that the District Court could not separate the two causes of action, retain one and dismiss the other at discretion cannot be valid. Different considerations of justice and expediency apply. Furthermore, an admiralty court has the power and duty to sever and dismiss non maritime aspects of a case. *The Ada*, C. A. 2, 250 Fed. 194. There would seem to be no compelling reason why the same should not be done when jurisdiction is discretionary.

In re Louisville Underwriters, 134 U. S. 488, is suggested as an authority for retention of discretionary jurisdiction. Brief, p. 20. The subject was not even involved. All the case holds is that a non-resident *citizen* may be sued in admiralty and his property attached if he cannot be found in the district of suit. That has been settled law for years.

There was no abuse of discretion in the holding of the District Court declining to proceed further with the fraud issues. It did not make that determination until after the petitioners had had full opportunity to make their factual case for attachment if they had one. There is no error in the Court of Appeals' holding that the cause, as against Cia Caribe, *might* have been dismissed entirely upon dis-

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[8] 46 U. S. Code 183, *et seq.*

cretionary grounds. But as we have shown heretofore, determination of the point is not *necessary* to sustain the order to vacate.

POINT V

The successor Judge had full power to grant the order vacating the attachment.

Petitioners argue in their Point C (Brief, pp. 20-1) that Judge Hancock, who granted the motion to vacate the attachment of the CARIBE, "should not be permitted to hold that his predecessor (Judge Gardner) had abused his discretion in taking jurisdiction of a case * * *." Judge Hancock did no such thing. He decided a new and greatly expanded motion, and did so without saying anything whatsoever about the propriety of Judge Gardner's decision on the previous one.

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9 Petitioners insist that the motion passed upon by Judge Hancock was the same motion as that made on March 15, 1948 passed upon by Judge Gardner. (Brief, p. 21). They are wrong. Judge Hancock made it clear in his original opinion (T. 73-4) that he was deciding the new motion: "On August 16, 1948 the respondent * * * filed motion to vacate and discharge attachment on steamship 'CARIBE and for an order dismissing the amended and supplemental libel * * *." This action is now before this Court on the above motion * * *." The statement in Judge Hancock's opinion on rehearing (T. 107) that the motion was filed on March 15 is an obvious inadvertence. That motion was filed August 16, as Judge Hancock correctly stated in his original opinion. The confusion was obviously due to the fact that the motion of August 16 was based, not only on the affidavit of Charles E. Ramirez certified on that date, but "upon all the pleadings, process and papers filed herein, and proceedings heretofore taken herein * * *." T. 63. Included in those papers was the *original* of March 15 and the supplemental and other documents attached thereto, which papers Judge Hancock examined in arriving at his decision. T. 107-8.

The first motion, which was presented to Judge Gardner *in absentia*, was denied by him on March 31, 1948, *at this time and upon this showing*," and, "*without prejudice to the respondents' filing any further motions* that they may desire to file." T. 50. Judge Gardner resigned the day after this decision.[40]

The claim that Judge Gardner's order determined conclusively the validity of the attachment or even the matter of jurisdictional discretion is unsound. That he did not intend to do so is clear from the wording of the order itself. Even if he had wished to make a conclusive order on any issue he would have lacked the power. A cause, while *sub judice* in a district court, is under control of the *court*, not of an individual judge. Even a decision or judgment on the merits of a cause may be altered by a successor judge on motion to vacate or for a new trial or rehearing. This Court made that clear in *Matter of The Life and Fire Ins. Co. v. Wilson*, 33 U. S. 291, where Mr. Justice McLean said:

> " * * * But the district judge is mistaken, in supposing that no one but the judge who renders the judgment, can grant a new trial. He, as the successor of his predecessor, can exercise the same powers, and has a right to act on every case that remains undecided upon the docket, as fully as his predecessor could have done. The court remains the same, and the change[41] of the incumbents cannot and ought not, in any respect, to injure the rights of the litigant parties. "

See also *Cahill v. Mayflower Bus Lines*, C. A. 2, 77 F. (2d) 878, cert. den. 296 U. S. 629; *St. Louis Southwestern Ry. Co. v. Henwood*, C. A. 8, 157 F. (2d) 337, cert. den. 330

40. 75 F. Supp. A.

41. So. Should read "change".

U. S. 836; *The Del-Mar-Va*, E. D. Va., 56 F. Supp. 743. The case last cited was an admiralty suit for collision damage. The trial judge decided to enter an order allowing one of the litigants to reopen the case in order to take the testimony of an absent witness. He did so after considering the matter in an informal manner, without benefit of a full statement of the law or the facts, or of oral argument. He died shortly thereafter and it was held that his successor in office had power to change the ruling and refuse to permit the case to be reopened.

In the cause at bar, it is clear that Judge Gardner would have had full power to entertain the second motion. It is equally clear that his successor in office had the same power, and that the respondent's rights were in no respect altered by the change of judges.

POINT VI

Cia Caribe's motion and preliminary proofs were sufficient to raise issue on the right to maintain the attachment. The burden was then with the petitioners.

The substance of petitioners' Specification No. 4 and Point D seems to be that the burden of proof on attachment issues was not with them and that the motion to vacate was simply a "defensive plea" which only raised issues to be postponed and determined as issues inherent in the merits of the cause. Incidental to this, they urge that the affidavit and documentary proofs tendered by Cia Caribe were incompetent, without evidentiary value and insufficient to comply with the requirements of Canal Zone Admiralty Rule No. 23.

The underlying error in their position is as to where the burden of proof lies. This was discussed at length in our foregoing Point II. This Court, in *Cushing v. Laird*, 107 U. S. 69, 83-4, and the Court of Appeals at bar have held that the burden, upon a challenged right to maintain an attachment, is with the libelants who assert it. It is not an issue of ultimate liability but an issue as to a provisional remedy. The claim was the right of the petitioners to attach the CARIBE as the property of the respondent Cia Trans maritima. The "defense" or opposition was that Cia Transmaritima had no property interest in it. The power of the District Court to determine that issue *pendente lite* is not even open to argument. All that was necessary to bring the issue on for hearing was a preliminary showing that the questions were substantial and seasonable notice to the petitioners.

Canal Zone Rule No. 23 outlines one way to bring up such issues on very short notice, perhaps within one day. Under it, upon an *ex parte* showing of probable cause, the Court may issue its order to the libelants to show cause *instanter* why the attachment should not be vacated. That is merely a recognition of the need for a more speedy determination of the issues than could be had on a regularly noticed motion. On the application for the order, the Court does not determine the facts or the law as to the right, but only the existence of probable cause for a hearing of them on shorter notice. Whether the issues are brought on by order to show cause or full notice of motion, the burden of proof is where the *law* places it—on the party who asserts the right to attach. While nearly all the maritime districts

[illegible] order to show cause [illegible] notice of motion. *McAuliffe v. Coughlin*, [illegible] Cal. 268, 38 p. 730. It is simply a means of shortening the usual [illegible] notice. *Petition of Logan Co.*, 138 N. Y. 557, 565, [illegible] 88 [illegible] 489.

have rules substantially identical with Canal Zone Admiralty Rule 23, orders to show cause are seldom sought. The more usual and thoroughly approved procedure is for the challenger of the right to attach to bring up the issues by a regularly noticed motion to vacate."

The Court of Appeals, looking to substance, held that our motion to vacate was made pursuant to Canal Zone Rule 23 and noted that one of our grounds (the thirteenth) was in the very words of the rule. T. 132. The only difference in our proceeding by notice was that the petitioners had more notice of hearing than they would have had from an order to show cause.

If a preliminary showing of probable cause was necessary to suggest that the motion had substance, the preliminary showing of Cia Caribe was more than that contemplated by Rule 23. It included the verified claim of Cia Caribe as unqualified owner of the attached ship, a showing by affidavits of the facts of the sale and possession and operation of the ship by it at the time of the levies. The affidavits went further and showed facts, readily verifiable from public records, which tended to negative the assertions of fraud or bad faith in the sale transaction. The notice of motion stated its points of law in great detail. The proof was certainly sufficient to show that its challenge of the right to attach had substance in fact and law and, beyond that, it could not be required to go unless and until the petitioners made at least a *prima facie* case in support of their right.

"See *The Heinrich Arp*, D. C. Z., 1936 A. M. C. 1198; *The Melmay*, D. C. Z., 1932 A. M. C. 1396; *The Valmar*, E. D. Pa., 38 Supp. 615; *United States v. Specified Quantities of Intoxicating Liquors*, C. A. 2, 7 F. (2d) 835. In the latter case, Judge Hough held that, in law or in admiralty, the validity of an attachment or seizure *in rem* can always be tested by motion to vacate, that the practice was proper and elementary. See T. 107.

The ship was attached as the property of Cia Transmaritima while it was in the possession and control of Cia Caribe. The existence of an attachable interest in Cia Transmaritima was inherent in any vindication of the right to attach. It was not necessary, preliminarily or on the hearing, for Cia Caribe to show an absolute title or ownership in itself: but it was necessary for the petitioners to show an attachable property interest existing in Cia Transmaritima.[45]

The petitioners' complaints that Cia Caribe's proofs were incompetent or insufficient have no substance. The burden was not with it and it was confronted with nothing to controvert. Furthermore, its proofs by affidavit and supporting documents were left undenied and uncontroverted after full hearing of the issues of fact and law.[46]

There is no substance in the suggestion (Brief, p. 23) that this motion was a proceeding for a summary judgment on the merits, analogous to a proceeding under the Federal Rules of Civil Procedure. The motion to vacate went only to the attachment.[47] The merits of the cause remain pending

45 A fair analogy can be drawn from the prize cases. The issue is "prize or no prize"; not the validity or strength of the title of the owner or claimant who appears in the prize court.

46 The competency of proof by affidavit on issues incidental or provisional to the merits is not open to question. Their probative value is for the Court to determine. Such proof, if controverted, may be weak or insufficient, but if allowed to stand uncontroverted, becomes strong, even conclusive. *Commissioners of Excise* v. *Purdy*, 13 Abb. Pr. (N. Y.) 434, 437 S; *Union Bank* v. *Mott*, 9 Abb. Pr. (N. Y.) 106, 109; *National Life Ins. Co.* v. *Braswell*, 209 Ky. 165, 217 S. W. 413.

47 Motions for summary judgment on fact issues going to the merits are unknown to the admiralty. That remedy was not supplied by the Rules of Civil Procedure which by their express terms do not apply in Admiralty. Rule 81 (a) (1). But historically, admiralty courts have determined summarily fact issues as to provisional and incidental rights on petitions upon affidavits and documents authenticated by them, without oral testimony. So did courts of law and equity, prior to the adoption of the Rules of Civil Procedure.

and undetermined in all factual aspects. That is the patent distinction between the case at bar and *The Celtic Monarch*, C. A. 9, 138 Fed. 711, which the petitioners see as in conflict. In *The Celtic Monarch*, a vessel was proceeded against *in rem* as the negligent participant in a collision. It was attempted to have her dismissed as a party by a motion for summary judgment on affidavit proof that she was not negligent. That went to the very essence of the merits of the cause. The Court held, very properly, that such an issue of fact could not properly be tried summarily or on affidavit proof.[48]

In addition to the reasons heretofore discussed we submit that the vacating of the attachment is sustainable upon numerous other grounds going to its inequity and irregularity in procurement which were fully presented and argued below. Some of them are:

1. The failure of the marshal to make any effort to find or even inquire for the respondent Cia Transmaritima before making the levy. The Court of Appeals passed this question on the view that the returns could have been amended. They were never amended and it is patent on the record that no inquiry was made. Cf. *Cushing* v. *Laird*, D. C. Fed. Cas. No. 3508.

2. The obvious lack of any substance or basis for the attack upon the sale of the Caribe, manifested by the conclusions,

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48 Issues of *law*, going to jurisdictional defects or the sufficiency of a pleading to state grounds for relief or defense, are, of course, determinable summarily in *all* courts; the issues of law being raised by demurrer, exceptions, motion to dismiss, motion for judgment on the pleadings and otherwise. We raised such issues of law in the aspects of our motion which challenged the sufficiency of the cause of suit attempted to be stated in the amended libel as to Cia Caribe as a respondent.

uncertainties and "and or" allegations of the amended libel and confirmed by the failure to offer any proof of them over a period of opportunity extending for eight months. The fraud asserted patently exists only in the mind of the pleader.

3. The gross irregularity of the Clerk in accepting the amended libel without an order of Court and issuing process of attachment upon it in disregard of the requirements of General Admiralty Rule No. 23[49] and Canal Zone Admiralty Rule No. 17.[50] The former authorizes amendments to the form and substance of a libel only on motion and order; the latter authorizes the bringing in of a new party only upon *petition* by an adverse party or the new party himself. Both rules were ignored. In effect, Cia Caribe was made a party and its vessel was attached on proceedings not taken as of right and allowed by the *Clerk of the Court!* He had no judicial power to determine the propriety of amendment, the bringing in of Cia Caribe or the right to attach its property.

In connection with these suggested points we invite consideration of the decision in *The Heinrich Arp*, D. C. Z., 1930 A. M. C. 1198.

[49] General Admiralty Rule 23. Amendments to Libels. In all informations and libels in causes of admiralty and maritime jurisdiction, amendments in matters of form may be made at any time, on motion to the court, as of course. And new counts may be filed, and amendments in matters of substance may be made, on motion, at any time before the final decree, on such terms as the court shall impose. * * *

[50] Canal Zone Admiralty Rule 17. New Parties. Whenever, from the death or any of the parties, or changes of interest in the suit, defects in the pleadings or proceeding, or otherwise, new parties to the suit are necessary the persons required to be made parties may be made such either by petition on their part or by petition of the adverse party. Benedict on Admiralty (6th Ed.) Vol. 5 (Recompiled), p. 232.

CONCLUSION

The case should be remanded to the Court of Appeals with directions to dismiss the appeal for lack of appellate jurisdiction. In the alternative, this Court should affirm the decision of the Court of Appeals sustaining the District Court's order vacating the attachment of the S. S. CARIBE.

Respectfully submitted,

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